Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell	)	
Infrastructure By Improving Wireless	)	WT Docket No. 16-421
Facilities Siting Policies;	)	
Mobilitie, LLC Petition For Declaratory Ruling	)	
	)	

REPLY COMMENTS OF THE WIRELESS INFRASTRUCTURE ASSOCIATION

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SUMMARY

While the Commission has made important strides toward lowering barriers to wireless infrastructure deployment, the comments in this proceeding confirm WIA's opening comments. Companies seeking to deploy small wireless facilities face significant obstacles that effectively thwart the deployment of small wireless facilities and equipment in public rights-of-way.

Delay is widespread and significant. Local governments are adopting formal moratoria on the deployment of small wireless facilities, and many other local governments are creating *de facto* moratoria by refusing to meaningfully act on siting applications. Contrary to the suggestion of some local government commenters, delays are not driven by providers. Rather, lack of clarity or consistency in local requirements is a significant cause of delay. Local government delays also are frequently driven by excessive regulation. Companies deploying small wireless facilities report multi-year delays driven by cities micromanaging every element of the technology and deployment. Companies also experience delay where local governments constantly change their demands and requirements—even after providers have worked with the local government over extended periods to develop a deployment that meets the local government's desires.

The record supports the need for the Commission to adopt a meaningful remedy for local government delays. Filing a lawsuit, which will be time consuming and potentially lead to a meaningless remedy, is not a realistic option, particularly when individual companies would have to file tens of lawsuits per year to remedy every violation of the Commission's *Shot Clock Order*. Accordingly, the Commission should declare that unreasonable delay by local government results in the application being deemed granted.

Although local governments express a desire to manage the public rights-of-way, their comments and actions are not limited to legitimate rights-of-way management. The Commission and courts have clearly defined the narrow meaning of "management" of the public rights-of-

way. Discretionary zoning or zoning-like requirements, or similar *ad hoc* discretionary processes, do not address the issues relevant to managing physical occupation of the public rights-of-way. Rather, such discretionary requirements concern issues such as the need for the facility and service, the technology choices, the aesthetics of the equipment, and ultimately even whether to exclude small wireless facilities from entire areas of the community. Indeed, local governments' comments make clear that such discretionary zoning requirements are imposed on small wireless facilities in addition to the standard rights-of-way management permitting that applies to other telecommunications, cable television, and electric company equipment that occupies the public rights-of-way. The requirements imposed on small wireless facilities are discriminatory and based solely on the incorporation of wireless equipment, despite the fact that small wireless facilities, as defined by WIA, are no different than the ubiquitous equipment installed in the public rights-of-way by the other utility users. The small wireless facilities that WIA and other commenters address, which are installed on existing utility and street light poles to the extent possible, are not the 75 to 120-foot-tall new poles on which the local governments' comments focus. Small wireless facilities are safe, just like the other equipment occupying utility poles and street light poles in the public rights-of-way. There is also no support for the assertion that small wireless facilities harm property values. Accordingly, there is no legitimate basis for the discriminatory imposition of discretionary, burdensome requirements, such as zoning processes, on wireless facilities in the public rights-of-way.

The agreements and ordinances identified by some municipal commenters are not necessarily reasonable and do not demonstrate that industry members agree with local government demands. Rather, they frequently reflect the leverage local governments have over

these deployments and the fact that telecommunications providers may have no choice but to accede to local demands.

Ultimately, local government comments reveal their desire to micromanage and control the market. Their comments demonstrate that local governments seek to decide whether particular services are actually needed in their communities. Local government comments even reveal their desire to second-guess and dictate technology choices. Yet, that is not the role set for local governments under the 1996 Act.

Accordingly, as WIA's opening comments discussed, the Commission should adopt a declaratory ruling, clarifying and addressing the appropriate standards under Section 253 and Section 332(c)(7) of the Act. Specifically, the Commission should declare that Section 253(a) is not limited to outright, "insurmountable," prohibitions on service, but is violated by any state or local requirement that: (a) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment;" or (b) imposes requirements that in combination or as a whole impede the provision of any telecommunications service, including, but not limited to, requirements that grant local governments zoning or similar unfettered discretion over applications and requirements imposing lengthy or onerous application processes. In addition, the Commission should make clear that requirements imposed only on small wireless facilities effectively prohibit the provision of telecommunications service and are not competitively neutral and nondiscriminatory. The Commission should also follow the recommendations to clarify that the traditional Section 332(c)(7) effective prohibition standard, which requires showing a significant gap in service and evaluation of alternatives, is unsupported by the statute and is inapplicable to small wireless facilities in the public rights-of-way.

The Commission should declare that 60 days is the maximum reasonable time period for a local government to consider a request to deploy small wireless facilities in the public rights-of-way.

Finally, the Commission should reject the desire of local governments to leverage their monopoly control over public rights-of-way and street light infrastructure for profit. Contrary to their current claims, it is well-established that cities hold the public rights-of-way in trust for the public—which includes communications facilities—not as landlords monetizing private property. Their control over the public rights-of-way is regulatory, not proprietary. The Commission should therefore declare that fees violate Section 253(c) when they exceed the local government's costs of managing the use of the public rights-of-way and when they exceed the fees imposed on other telecommunications occupants of the public rights-of-way.

The Commission clearly has authority to issue such a declaratory ruling addressing Section 253. The courts, including the United States Supreme Court, have repeatedly affirmed the Commission's broad authority to interpret the Communications Act, even when it does not have a direct adjudicatory role. Here, the preemptive authority granted the Commission by Section 253(d) further confirms the Commission's authority to interpret Section 253, including Section 253(c). Local governments are not free from oversight merely because public rights-of-way are involved.

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I. INTRODUCTION

Nearly every day, there is more recognition of the importance of providing current and future wireless broadband services as an important element of the nation's economy. And likewise, there is overwhelming recognition that to support the provision of such service, we must facilitate the deployment of the small wireless facilities that will make such services available. As Congresswoman Blackburn noted on March 21, 2017, "[t]he 5G revolution is upon us and we should modernize our laws to address issues such as tower siting and federal rights of ways, which are tying the hands of our private sector."[1] And as Chairman Pai explained on March 29, 2017:

> We believe the most powerful tool for unleashing investment and innovation is a competitive free market—and are thus focused on rules that promote it. That's why—consistent with decades of bipartisan tradition—we are pursuing a light-touch regulatory approach. This approach suggests that the Internet should be free from heavy-handed government regulation. It seeks to eliminate unnecessary barriers to infrastructure investment that could stifle broadband deployment. It aims to minimize regulatory uncertainty, which can deter long-term investment decisions. . . . It encourages competition among companies using any technology and from any sector—cable, telco, fixed wireless, mobile, and satellite. It embraces regulatory humility, knowing that this marketplace is dynamic and that preemptive regulation may have serious unintended consequences. And it places demands on the FCC itself—to be responsive to the public and to act as quickly as the industry it regulates. This regulatory approach, not the command-and-control rules of the 20th century, is most likely to promote digital infrastructure and opportunity.[2]

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[1] Opening Statement of Honorable Marsha Blackburn to House Subcommittee on Communications and Technology, Hearing on "Broadband: Deploying America's 21st Century Infrastructure" (Mar. 21, 2017), http://docs.house.gov/meetings/IF/IF16/20170321/105740/HHRG-115-IF16-MState-B001243-20170321.pdf.

[2] Remarks of FCC Chairman Ajit Pai to U.S. – India Business Council, Washington DC (Mar. 29, 2017); *see also* Testimony of FCC Commissioner Michael O'Rielly Before U.S. Senate Committee on Commerce, Science, & Transportation, "Oversight of the Federal Communications Commission (Mar. 8, 2017) ("FCC Oversight Hearing") ("[S]tanding in the

The record in this proceeding fully supports the need for the Commission to take aggressive steps to promote the deployment of small wireless facilities by eliminating excessive, unnecessary regulatory barriers to entry. Consistent with Chairman Pai's comments, despite the passage of over twenty years since the Telecommunications Act of 1996 (1996 Act) declared that competition, not local regulation, should determine what new technologies and what new providers are able to succeed, local governments continue to insert themselves as gatekeepers to the telecommunications market. Unsatisfied with the role of managing the public rights-of-way, local governments want to be the arbiters of every element of wireless deployment, including second-guessing technology choices, business need, and regulatory status, among other things. They want the ability to prohibit small wireless facilities altogether in entire areas of communities and to use their control over access to public rights-of-way to manipulate markets for their own profit. Fundamentally, based solely on the wireless element, they want to continue exercising the same discretionary control over small wireless facilities on utility poles that they applied to 200-foot-tall towers on private property for twenty years. Yet such discretionary and burdensome zoning regulations are not imposed on any other companies that deploy facilities in the public rights-of-way.

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way of greater Internet access nationwide are barriers imposed by state, local, and tribal entities. . . . This problem will become even more acute as providers seek to deploy the next generation, or 5G wireless services, that . . . will also require many more wireless tower and antenna siting approvals. I realize that preempting local community decisions is a difficult topic to contemplate, but it has become necessary and appropriate for the Commission to exercise authority provided by Congress to address this situation."); Testimony of FCC Commissioner Mignon Clyburn Before FCC Oversight Hearing (Mar. 8, 2017) ("In order to reap the benefits of 5G services, however, we need to not only have adequate spectrum, but the necessary infrastructure, such as small cells and distributed antenna systems (DAS), to deploy that spectrum.").

Congress acted to prevent such local government overreach. As WIA's and other parties' comments demonstrate, Section 253 imposes a significant limitation on local government control over telecommunications deployment. The Commission and numerous federal courts correctly recognized and applied Section 253's limitations initially. But a few recent decisions have derailed Section 253, essentially nullifying it.

Accordingly, the Commission should now act to reinvigorate and clarify Section 253's preemption of local government regulation, and at the same time clarify and provide a meaningful remedy for violations of Section 332(c)(7). The comments submitted in this proceeding do not contradict the need for such Commission action—they emphasize the need for it.

II. THE RECORD CONFIRMS THE NEED FOR COMMISSION ACTION

In the *Public Notice*, the Commission asked whether the concerns that motivated its 2009 *Shot Clock Order*[3] and *2014 Wireless Infrastructure Order*[4] still exist and whether they have become more or less salient.[5] The record of comments in this proceeding confirms that the concerns previously identified by the Commission about delay and impediments to deployment

[3] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd 13994 (2009) ("*Shot Clock Order*"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[4] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014) ("*2014 Wireless Infrastructure Order*"), *aff'd, Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[5] *Public Notice*, Comment Sought on Streamlining Employment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, 31 FCC Rcd 13360, 13367-68 (2017) ("*Public Notice*").

of small wireless facilities are still a problem and that Commission action is appropriate to remedy those issues.

Notably, the record reveals widespread local delay for companies seeking to deploy small wireless facilities in the public rights-of-way. The reasonable periods of time for review defined by the Commission's *Shot Clock Order* are regularly exceeded, to the point where it is impractical for companies to protect their rights in court. In addition, the record clearly reveals that local governments are significantly exceeding their Section 253(c) role of managing the public rights-of-way. Although they assert that they need to manage the public rights-of-way for health and safety through issues, such as engineering and coordination of utilities, local governments' comments and the experience of industry reveal that local governments go far beyond reasonable right-of-way management. Local governments want to be gatekeepers over every aspect of wireless deployment, including dictating technologies, planning network and service deployment, limiting deployment to certain areas, and even becoming market participants themselves, seeking to profit from their unique control over the public rights-of-way.

The record thus reveals local governments have lost sight of the role defined in the 1996 Act. The Commission should accordingly clarify the role of local governments in reviewing applications for wireless facilities.

A. There Is a Significant Record Showing that Local Government Regulation Is Preventing the Deployment of Small Wireless Facilities

1. Delay Is Common

WIA's initial comments supplied the Commission with specific data about the percentage of localities where members' applications took longer than even the longest interpretation of the

Commission's *Shot Clock Order*.[6] Other commenters further demonstrated the widespread problem of delay. For example, Crown Castle described how many cities are causing delay by requiring lengthy "pre-application" processes in which municipal staff give feedback requiring changes that create a cycle of delay.[7] Indeed, in *Crown Castle NG East, Inc. v. Town of Greenburgh*, the town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even "deem complete" Crown Castle's application.[8]

ExteNet provided the Commission with specific data revealing that 47% of its applications had taken longer than even the longest reasonable shot clock applicable to installation of small wireless facilities on existing utility poles.[9] It also included an example of a two-year-long ordeal where the city repeatedly changed the requirements.[10] Similarly, Lightower disclosed that forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year.[11]

T-Mobile reported that cities sometimes require a Master License Agreement for right-of-way access, but merely negotiating the agreement takes six months to a year or more, and only

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[6] WIA Comments at 5-6.

[7] Crown Castle Comments at 21-22.

[8] *Crown Castle NG East, Inc. v. Town of Greenburgh*, No. 12-CV-6157, 2013 WL 3357169 (S.D.N.Y. July 3, 2013), *aff'd*, 552 F. App'x 47 (2d Cir. 2014).

[9] ExteNet Initial Comments at 5. As ExteNet explained, under the *2014 Infrastructure Order*, the longer 150-day shot clock is applicable to small wireless facility deployments involving installation of *new* poles, whereas attachments to existing utilities poles should be subject to the 90-day shot clock. *Id.*

[10] ExteNet Comments at 9-15.

[11] Lightower Comments at 4.

then can the company even submit an application.[12] Verizon provided a six-page-long Appendix listing many delays it has encountered.[13] AT&T likewise exposed delays it has encountered, including one in California where the applications took over 800 days.[14] The AT&T example is all too common.[15]

The record demonstrates that the delays in processing are not due to a lack of staff or due to right-of-way management issues. Rather, delays are caused by cities seeking to micromanage the technology and business. For example, AT&T explained that in its California example, the city staff insisted on "scrutinize[ing] the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance."[16]

Local government comments further demonstrate the problem. Rather than demonstrating their plans to comply with the *Shot Clock Order* and support the deployment of small wireless facilities, local governments repeatedly reveal their intention to act as gatekeepers, imposing a third tier of regulation.[17] Some local governments assert that they review right-of-way applications promptly, yet they are also demanding that providers comply with discriminatory,

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[12] T-Mobile Initial Comments at 6.

[13] Verizon Initial Comments at Appendix A.

[14] AT&T Comments at 23.

[15] *See, e.g.*, Comments of Lightower at 4 (noting an application that has been pending in one municipality for 993 days); ExteNet Comments at 11-14 (two year process).

[16] AT&T Comments at 23.

[17] *See, e.g.*, Maryland Municipal League Comments at 2 (addressing deployment of small wireless facilities as if it were a commodity that cities are allowed to manipulate through the fees they charge); Smart Communities Siting Coalition Comments at 6 (reflecting that local governments want to control private investment to protect municipal entry into the market).

inapplicable zoning requirements that create extensive delay.[18] Ultimately, local governments' attempts to justify their delays reveal a vision of the market that is inconsistent with the 1996 Act. Rather than a deregulatory environment with local governments coordinating construction and enforcing standard safety codes, local governments view themselves as arbiters of entry.

2. Explicit and Implicit Moratoria Are Widespread

The record also reveals widespread moratoria on the deployment of small wireless facilities—some explicit and some implicit. WIA noted a number of moratoria, but other parties also reported more.[19] Verizon reported at least thirty-four communities where there were either explicit moratoria or the cities were accomplishing the same outcome by effectively refusing to process applications or engage with Verizon.[20] CTIA reported that at least seventeen communities in Florida have imposed moratoria, with another seven pending.[21] AT&T likewise reports common moratoria, including in Texas and Florida, and at least one northeast legislature that is considering a statewide moratorium.[22] The explicit moratoria are combined with local governments that are achieving *de facto* moratoria via extensive, intentional delay.[23]

More than twenty years after the adoption of the 1996 Act, local governments have no justification for these reactions to small wireless facility deployments. The 1996 Act intended specifically to prevent such behavior. The reaction of local governments to a "new technology"

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[18] *See, e.g.*, Virginia Joint Commenters Comments at 9-10; Minneapolis Comments at 3-4.

[19] *See, e.g.*, T-Mobile Comments at 19.

[20] Verizon Comments at Exhibit A.

[21] CTIA Initial Comments at 12.

[22] AT&T Comments at 7.

[23] *See, e.g.*, ExteNet Comments at 5-6; Crown Castle Comments at 15-19; Lightower Comments at 10-11.

cannot be to prohibit its deployment until the local government decides whether it likes the new technology.[24] They are required to approve the deployments subject only to nondiscriminatory rights-of-way management.

3. Applicants Are Not the Cause of Delay

A frequent refrain in local government comments is that to the extent there are delays, the cause is applicants. As a threshold matter, the fundamental premise of that assertion is untenable. WIA's members are keenly focused on speed to market.[25] They are seeking relief from the Commission because they are encountering delays that are out of their control. WIA does not dispute that in some cases an applicant may not rush every application, but that is not the basis for the delays discussed in WIA's comments.

Moreover, the examples of alleged industry delay identified by local governments are almost exclusively directed at applications by Mobilitie to install new poles that are 75 to 120 feet tall.[26] Rather than contradicting the need for Commission action, the cities' comments about those installations reinforce that small wireless facilities, as defined by WIA[27] (consistent with state actions and the Commission's definition), can and should be treated on the same expedited timeframe as non-wireless telecommunications equipment installed in the public rights-of-way.

In addition, municipal arguments that applications are "incomplete" reflect the lack of clear regulations and municipal gaming of the system, not industry foot dragging. As WIA and

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[24] *See* 47 U.S.C. § 157(a).

[25] *See, e.g.,* Lightower Comments at 22 ("In a time when technology is changing rapidly and consumer demands change even more rapidly, speed to market is critical.").

[26] *See, e.g.,* Siting Coalition Comments at 20-21 (citing delays due to application to install 75 and 100-foot-tall poles in historic districts or on sidewalks near handicap ramps); Florida Coalition Comments at 17-18, 20-33.

[27] WIA Comments at 1.

others emphasized, the patchwork quilt of local requirements alone is a significant barrier to deployment.[28] Neighboring towns can impose radically different application requirements. As a result, companies seeking to deploy regional or statewide networks are unable to even rely on consistent application requirements.

And as many commenters' experiences reveal, lack of clarity creates significant delay. Reflecting a general opposition to new technology or wireless facilities in general, local governments refuse to follow their own standard right-of-way process and will essentially make up the process on an *ad hoc* basis, changing the demands during the process.[29] Similarly, some municipal commenters argue that the shot clock should not run until a "complete" application is submitted.[30] Yet providers have repeatedly experienced how local governments will refuse to agree that an application is complete. Again, *Crown Castle v. Greenburgh* is a classic example of how cities will constantly ask for new information and demand changes, even if not required by the local code.[31] In another example, a WIA member reports that it has been seeking approval to deploy nineteen small cells from Cary, North Carolina (a local government that views itself as reasonable)[32] since January 2015, and the town has changed its process three times while that application has been pending—from a right-of-way process, to a zoning-type process, and then a formal zoning process. Contrary to their comments, the Town of Hempstead, New York recently objected to multiple applications submitted by a WIA member to collocate nodes on existing

[28] *See, e.g.*, Crown Castle Comments at 15-19; ExteNet Comments at 6-17; Lightower Comments at 5-12; T-Mobile Comments at 7; Verizon Comments at 6-10.

[29] *See, e.g.*, WIA Comments at 14-15; ExteNet Comments at 5; Lightower Comments at 5.

[30] League of Arizona Cities and Towns, *et al.* (Arizona Coalition) Comments at 21-22.

[31] *Town of Greenburgh*, 2013 WL 3357169, at *16-17.

[32] *See* Comments of Cary, North Carolina at 3.

utility poles in the right-of-way.[33] Notwithstanding the fact that the member has approximately 150 nodes in operation in the Town of Hempstead and that the proposed deployment is not substantially different than the prior 150 nodes, the town consultant has now taken the position that the use of concealment technology is required to minimize the adverse aesthetic and visual impacts. The town is now requiring the member to present new designs for the nodes and to obtain special use permits pursuant to the town zoning code. Similarly, the planning department of a city in California just declined to support approval of a proposed small wireless installation, claiming that the installations do not meet "Planning and Zoning Protected Location Compatibility Standards"—even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the "Protected Location" standards should not apply because the proposals are not on "protected view" streets. It is an example of a purely subjective review, where the city claims that equipment that has been approved dozens of times elsewhere in the same city is now not compatible.

In another example, a WIA member spent over a year working with a different city in California on facility designs before it could even apply. After this yearlong collaborative process, the applicant submitted the permit applications required by the city and the city changed its mind, demanding changes to the equipment installation design. Similarly, a WIA member this week received an incomplete letter from a city in Washington, despite the fact that the member had worked through a lengthy franchise negotiation with the city that was supposed to resolve these issues. It appears the city is raising new issues very late in the game—even though the city had over a year to review and work with the provider.

[33] *See generally* Town of Hempstead Comments.

The FCC sought to eliminate this type of behavior when it required cities to identify, in writing, the specific regulations they asserted were not met in a notice of incomplete application, and also held that the shot clock is not tolled by subsequent demands for information that were not part of the original notice citation.[34] Demonstrating precisely WIA's point, the League of Arizona Cities Coalition asks the Commission to eliminate that requirement.[35] The only reason local governments could want to eliminate that rule is because they want to ask a never-ending string of new information demands without ever triggering a shot clock violation. Such a situation would vest in local governments inappropriate discretion over whether and when an application is ever "complete," perpetuating delay and prohibiting deployment.

To be clear, WIA is not suggesting that the Commission should define a single, nationwide permit application. However, a ruling that local governments can require only their standard, generally applicable, ministerial right-of-way permit would significantly improve the speed at which providers can deploy small wireless facilities and the broadband services that they support.

Finally, there is no evidence that shorter time frames will overwhelm some communities that lack the resources to review new applications. As a threshold matter, as WIA noted in its initial comments, local governments are often "overwhelmed" only because they seek to impose on small wireless facilities requirements that are not consistent with the local government's own standard right-of-way permit process used for all other telecommunications and utility equipment in the public rights-of-way.[36] Those other installations are handled on a regular, ministerial basis

[34] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970 ¶¶ 259-260.

[35] Arizona Coalition Comments at 23.

[36] WIA Comments at 58-59.

in a matter of days or weeks.[37] Local governments will overwhelm themselves when they attempt to micromanage every aspect of private industry deployment, as described by AT&T, for example, with a California city's staff insisting on scrutinizing the design and operational details of each node, including issues such as whether a macro site or distributed antenna system (DAS) node would best cover an area, antenna designs, radio frequency (RF) exposure, property values analyses, concealment, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance.[38] Such examples are not unique.

If there is a genuine issue of local government staffing, providers have proposed to pay for contractors to help process applications.[39] However, the deployment of small wireless facilities should not be an opportunity for consultants to profit by driving demands for more complex reviews and more information.[40] Unfortunately, WIA's members have frequently encountered situations where a consultant will create a "model" local ordinance that in turn will essentially require the municipality to then hire the consultant to perform detailed reviews of applications, all at the expense of the applicant.[41] Under such circumstances, the consultants have every incentive to drag out the process.

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[37] *See* Lightower Comments at 8 (discussing experience with fiber deployment versus small wireless facilities).

[38] AT&T Comments at 23.

[39] Verizon Comments at 17.

[40] Indeed, consultants, such as Cityscape Consultants, Inc., have filed comments pressing for just such self-serving review. *See generally* Comments of Cityscape Consultants, Inc.

[41] The credibility of at least one municipal consultant has been called into question by several courts. *See, e.g., MetroPCS New York, LLC v. City of Mount Vernon*, 739 F. Supp. 2d 409 (S.D.N.Y. 2010) (finding, *inter alia,* that consultant's fees for work were overstated and that consultant improperly delayed the application by repeatedly requesting unnecessary information and belaboring issues already resolved); *T-Mobile Ne. LLC v. Inc. Vill. of E. Hills*, 779 F. Supp.

4. The Record Emphasizes the Need for a Meaningful Remedy

As WIA explained in its initial comments, despite the Commission's actions in the 2009 *Shot Clock Order* and 2014 *Wireless Infrastructure Order* to promote the timely deployment of small wireless facilities, there is a need for a meaningful remedy. Filing a federal lawsuit every time a local government violates the shot clock would burden companies with dozens of lawsuits.[42] Those lawsuits would then take months to reach a summary judgment motion, and in the end, even if the court found a violation of the shot clock, there is a risk the court's "remedy" may be to remand the matter back to the local government with only an order to finally issue a decision.[43] Such a scenario is untenable.

Other commenters echoed WIA's point. For example, Verizon articulated the problem with enforcement of the current shot clock, and explained that the Commission has authority to adopt a deemed granted remedy.[44] Indeed, Verizon pointed out that the Commission had adopted a deemed granted remedy for Section 621 when local authorities unreasonably refuse to grant a competitive cable television franchise within a specified period.[45] The Sixth Circuit upheld the Commission's authority to impose the deemed granted remedy.[46] Likewise, AT&T articulated

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2d 256 (E.D.N.Y. 2011) (consultant's conclusions not supported by credible evidence); *Nextel W. Corp. v. Town of Edgewood*, 479 F. Supp. 2d 1219, 1240 (D.N.M. 2006) (same); *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325 (D.N.M. 2007) (requiring consultant to disgorge fees).

[42] *See, e.g.*, ExteNet Comments at 5-6 (would have 47 shot clock lawsuits within a two-year period); Lightower Comments at 5 (would have 46 shot clock lawsuits since 2014).

[43] *See, e.g., Up State Tower Co. v. Town of Kiantone*, No. 1:16-cv-00069, 2016 WL 7178321 (W.D.N.Y. Dec. 9, 2016).

[44] Verizon Comments at 23.

[45] *Id.* at 24-25.

[46] *Id.*

the inadequacy of the current shot clock enforcement mechanism and urged the Commission to adopt a deemed granted remedy.[47] AT&T explained that a deemed granted remedy would be consistent with the text of Section 332(c)(7)(B)(v) because the statute provides that a person "adversely affected by any final action or failure to act by a State or local government *may* . . . commence an action in any court of competent jurisdiction," and the permissive nature of the statute leaves room for the Commission to fashion other remedies.[48]

Lightower, explained that "[h]aving to bring suit in every such case [of a shot clock violation] would, in and of itself, effectively prohibit Lightower from providing telecommunications service."[49] In addition to proposing a deemed granted remedy for violation of the Section 332(c)(7)(B)(ii) shot clock, Lightower explained that the Commission has broad authority to preempt local requirements that have the effect of prohibiting the provision of telecommunications services under Section 253(d). Lightower explained that the Commission can and should also issue a declaratory ruling that failure to act within 60 days is a prohibition of service in violation of Section 253(a), and that the result would be that the application would be deemed granted.[50]

Numerous other parties also explained how the lack of a meaningful remedy for municipal delay was prohibiting the provision of telecommunications services and that the Commission should adopt more meaningful remedies.[51] WIA supports all of those comments. A

[47] AT&T Comments at 25-26.

[48] *Id.* at 26.

[49] Lightower Comments at 5.

[50] *Id.* at 24-25.

[51] *See, e.g.*, ExteNet Comments at 36-39; Crown Castle Comments at 33-37; T-Mobile Comments at 22-28; CTIA Comments at 39-43.

ruling by the Commission that municipal delay violates the 1996 Act must be meaningful. Adopting a prompt deadline for local government to act, but then requiring months to enforce it completely nullifies the Commission's action.

B. Local Governments Are Not Limiting Themselves to Managing the Public Rights-Of-Way

WIA and other industry commenters do not dispute that local governments have authority under Section 253(c) to manage the public rights-of-way on a competitively neutral and nondiscriminatory basis. But that is not what local governments are doing or what they want to do regarding the deployment of small wireless facilities. Comments filed by both industry and local governments reveal that local governments seek to single out small wireless facilities for extensive regulation based solely on the fact that they are used to provide wireless services. As such, local governments are not limiting themselves to legitimate rights-of-way management issues; instead, they seek to regulate nearly every element of wireless deployment. Essentially, they believe that they should control and dictate the design and deployment of the networks. In other words, they want the polar opposite of the deregulatory system that Congress imposed with the 1996 Act.

1. Zoning and Other Discretionary Requirements Are Unrelated to Legitimate Rights-of-Way Management

The role of local governments regarding deployment of telecommunications services in the public rights-of-way was clearly defined in the 1996 Act. Section 253(a) created a broad preemption of local government requirements, with only narrow authority reserved in Section 253(c) for local authorities to manage the public rights-of-way on a competitively neutral and

nondiscriminatory basis.[52] The purpose of Section 253(a) was to remove the ability of state or local governments to choose or influence who could provide telecommunications services.[53] As the Commission explained in the *Texas PUC Order*, "[t]hrough this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states."[54] In *TCI Cablevision of Oakland County, Inc.*, the Commission emphasized that "Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers."[55]

The scope of legitimate right-of-way management under Section 253(c) is well established. It is not a broad opening to regulate any and all aspects of the industry simply because the facility will be in the public rights-of-way.[56] Rather, the Commission and courts have held that right-of-way management tasks are limited, and include only matters such as "coordination of construction schedules, determination of insurance, bonding and indemnity

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[52] 47 U.S.C. § 253(c); *see, e.g.*, *TCI Cablevision of Oakland Cty.*, 12 FCC Rcd 21396, 21441-43 ¶¶ 103-109 (1997).

[53] *See, e.g.*, *Public Util. Comm'n of Tex.*, 13 FCC Rcd 3460, 3463 ¶ 4 (1997) ("*Texas PUC Order*").

[54] *Id.*

[55] *TCI Cablevision*, 12 FCC Rcd at 21440-41 ¶¶ 102, 105; *see also New Jersey Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 245 (3d Cir. 2002) (noting Congress' "intent to enhance competition and eliminate local monopolies"); *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (noting Section 253 "prevent[s] state and local governments from standing in the way of Congress's new free market vision").

[56] *See, e.g.*, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1180 (9th Cir. 2001) (rejecting argument that presence of facilities in right-of-way justified extensive regulation, stating "the safe harbor provisions would swallow whole the broad congressional preemption"). As discussed in WIA's opening comments, although the Ninth Circuit amended *Auburn's* Section 253(a) standard, WIA believes *Auburn's* interpretation of Section 253 is correct and worthy of evaluation.

requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[57]

In their comments, local governments assert that they are concerned about managing the public rights-of-way, and in relation to that management, they assert they seek to ensure installations comply with "current health, safety, building, engineering, and electrical requirements" and that they seek to "protect the public safety and welfare, to minimize service disruptions to the public, to protect public investments in rights-of-way, to assure the proper placement of service lines, to regulate the placement of service facilities . . . ."[58]

Yet it is clear that local governments are not limiting themselves to legitimate right-of-way management regulation. Rather, as WIA's and other parties' comments demonstrate, local governments are imposing discretionary, zoning (or zoning-like) requirements that are entirely separate from the local governments' right-of-way management.[59] As noted above, AT&T's comments provide a telling example of a California city that insisted on scrutinizing "the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses,

[57] *See, e.g.*, *AT&T Commc'ns of SW, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591-92 (N.D. Tex. 1998) (citing *TCI Cablevision*, 12 FCC Rcd at 21441 ¶ 103 and *Classic Tel.*, 11 FCC Rcd at 13082 ¶ 40); *see also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 20227 (1996).

[58] National League of Cities, *et al.* (NLC) Comments at 10.

[59] *See, e.g.*, WIA Comments at 7-14; CTIA Comments at 17-18; AT&T Comments at 23-24; ExteNet Comments at 7-9.

stealthing, . . . acoustic noise studies, screening, . . . and network performance."[60] Those issues are not right-of-way management. And AT&T's experience is not unique.[61]

Indeed, the cities' own comments admit their broad intentions. The most remarkable example is the "Smart Communities Siting Coalition" ("Siting Coalition"), which includes a "Report and Declaration" from an alleged technology expert that essentially argues that cities should be second-guessing and dictating the technologies chosen by providers.[62] Indeed, the Siting Coalition's comments reveal that they believe local governments should be the ones to "identify, leverage, and support other developing wireless technologies such as IoT networking sensors that will enable our communities to offer solutions related to transportation, energy, air pollution, public Wi-Fi, *and other new generation services*."[63] In other words, the local governments want to control private investment to protect municipal entry into the market. This is not management of the public rights-of-way; it is manipulation of the market.

Other local government comments also reveal that they seek to impose requirements beyond those related to managing the public rights-of-way. For example, the Virginia Joint Commenters clearly describe how there is a standard right-of-way access permit process that applies to all public rights-of-way users.[64] Yet, for "wireless" equipment there is an *additional*, separate zoning requirement.[65]

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[60] AT&T Comments at 23.

[61] *See, e.g.*, CTIA Comments at 14 (illustrating cities' attempts to micromanage wireless investment).

[62] Siting Coalition Comments Exhibit 1, Report of Andrew Afflerbach.

[63] Siting Coalition Comments at 6 (emphasis added).

[64] Virginia Joint Commenters Comments at 16.

[65] *Id.* at 9-10.

As the comments reveal, zoning is unrelated to rights-of-way management. Zoning applications require showings of a business and technical need for the service, focus on aesthetics, and ultimately, are an exercise in limiting deployment in particular areas. Zoning is, by definition, the process by which a local government would say that it is not acceptable to install an industrial waste processing facility in the middle of a residential area, for example. It is not the vehicle by which local governments should manage communications providers' use of the public rights-of-way. Excluding all small wireless equipment from the public rights-of-way in entire parts of a community is not rights-of-way management.

The public rights-of-way are a common use corridor that serves the public interest by providing a single location for communications and utility equipment. A recognized purpose of the public rights-of-way is for common use by communications facilities. The Texas Supreme Court, for example, has recognized that public rights-of-way "have been held to include the laying of sewer, gas and water pipes, ***telegraph and telephone lines***."[66] The Court explained that "[t]he uses may be generalized as travel, transportation of persons and property ***and communication***."[67] In 2012, the Texas Supreme Court again reiterated that the purposes included in a right-of-way dedication "of course, include transporting people and property, ***but a public street may also be used as a passageway for utilities and other public purposes***."[68] Similarly, the Minnesota Supreme Court has recognized that "the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are

[66] *Harris County Flood Control Dist. v. Shell Pipe Line Corp.*, 591 S.W.2d 798, 799 (Tex. 1979) (emphasis added).

[67] *Id.* (citing *Hill Farm v. Hill County*, 436 S.W.2d 320 (Tex. 1969)) (emphasis added).

[68] *State v. NICO-WF1, L.L.C.*, 384 S.W.3d 818, 821 (Tex. 2012) (citing *Harris County*) (emphasis added).

designed even though their principal use is for travel and the transportation of persons and property."[69] The Court explained that allowing such use of the public rights-of-way is a "clear recognition that the use of highway rights-of-way for the transmission of public intelligence and public utility services confers important and direct benefits upon the public" and facilitates "full and efficient use of the land surface occupied by public roads."[70] That is why local governments historically have not required "zoning" approval for installation of new equipment on utility poles—even in residential zones.

It is only because cities have grown accustomed to exercising zoning control over "wireless" facilities on private property that they now seek to extend that regulation to the public rights-of-way. But all of their legitimate rights-of-way management concerns can, and should, be governed by the same, standard rights-of-way permitting process that is imposed on all other communications and utility companies, without additional zoning requirements.

2. Small Wireless Facilities Are No Different than Long-Established Communications and Utility Infrastructure in the Public Rights-of-Way

In an attempt to justify treating small wireless facilities radically differently than other right-of-way occupants, local governments submit a parade of alleged problem installations that, they contend, justifies extensive regulation. Essentially all of the municipal examples are directed at proposals to install new poles of 75 to 120 feet tall.[71] However, WIA's comments

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[69] *Minneapolis Gas Co. v. Zimmerman*, 91 N.W.2d 642, 649 (Mn. 1958).

[70] *Id.*; *see, e.g.*, *City of Chandler v. Arizona Dep't. of Transp.*, 231 P.3d 932, 935-36 (AZ Ct. App. 2010).

[71] *See, e.g.*, Siting Coalition Comments Exhibit 1, Report of Andrew Afflerbach at 6-8; Texas Municipal League Comments, Attachment 1; San Antonio Coalition Comments at 19; Pennsylvania Ass'n of Township Supervisors, *et al.* Comments at 8-9.

focused on a carefully defined set of installations that fit within established volumetric and height parameters.[72] Specifically, "small wireless facilities" mean (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume.[73] In addition, the term small wireless facility in WIA's comments (based on the Commission's definitions) means an installation on a pole or other support structure in the right-of-way that is no greater than (i) fifty feet above ground level or (ii) ten feet in height above the tallest existing utility pole within 500 feet of the installation, whichever is greater.[74]

The equipment that falls within WIA's definition of "small wireless facilities" is entirely consistent with the equipment already installed in the public rights-of-way by other communications, cable, and electric companies. As a result, the concerns expressed by local governments about 75 to 120-foot-tall new poles are not applicable to the small wireless facilities discussed by WIA and others and do not justify extensive regulation.[75]

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[72] WIA Comments at 1; *see also* ExteNet Comments at 2.

[73] WIA Comments at 1. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services. *Id.*; *see also* ExteNet Comments at 2.

[74] *Id.*

[75] *See also* Verizon Comments at 26 (citing Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Public Notice, 31 FCC Rcd 8824 (WTB 2016), *codified at* 47 U.S.C. Part 1, Appendix C, Section VI.A.4 (a) and (b)(i) ("Collocation Agreement Amendment")). Likewise, there is no merit to the Siting Coalition's assertion that "small cell" is a reference to the size of the area covered by signal. Siting Coalition Comments at 12 and Afflerbach Report. The

Cable operators and wireline telecommunications operators commonly install equipment on utility poles, and indeed, those installations are far more common than any small wireless facility. For example, in the image below, which is in a residential area of Newport News, Virginia, there are cable television equipment boxes on every other pole, in front of homes. Likewise, the poles have electric cross arms and large transformers.

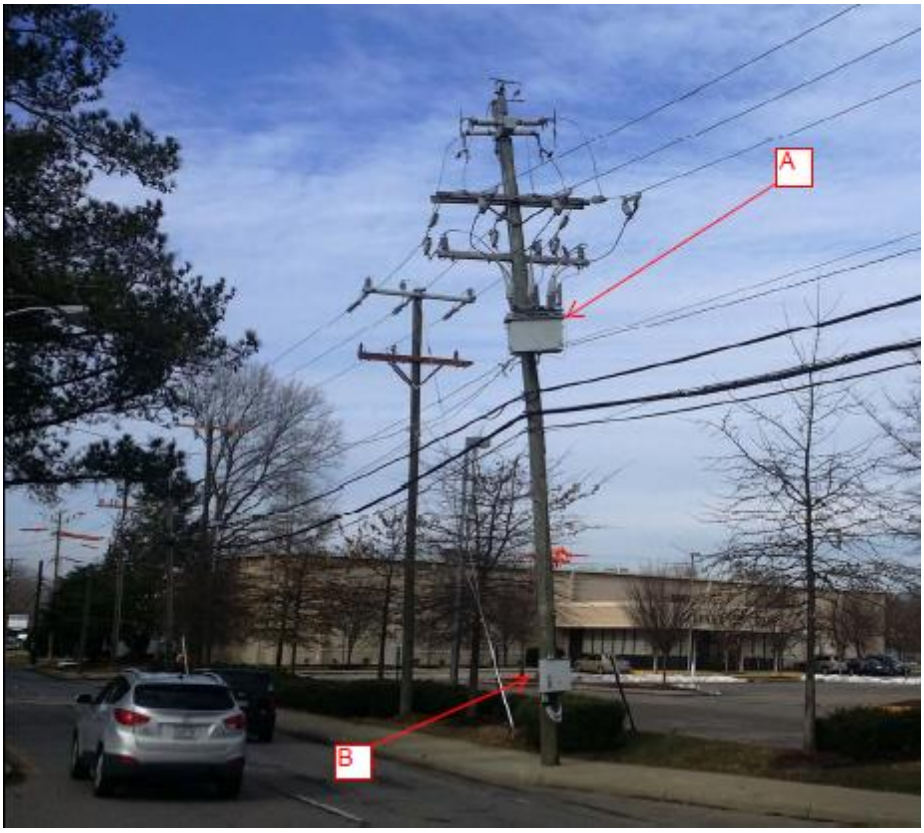
Commission has repeatedly made clear that when it refers to small cells and DAS networks it recognizes that the equipment is significantly smaller than traditional macro towers. *See* Public Notice, 31 FCC Rcd at 13371 (noting that small cells "are much smaller" and that "[d]ue to their size and placement, small cells may have less potential for aesthetic and other impacts than macrocells"); *2014 Infrastructure Order*, 29 FCC Rcd at 12880 ¶ 33 (stating that "[s]mall wireless technologies like DAS and small cells have a number of advantages over traditional macrocells" and "the facilities deployed at each node are physically much smaller than macrocell antennas and associated equipment").

A close-up of one of the cable TV equipment boxes shows that the box is accompanied by electric meter and shut off equipment.

Telecommunications fiber boxes are also installed on poles as shown in the photograph below (this image is also from Newport News, Virginia).

 (wireline telecommunications equipment box in front of house)

Even larger equipment is often installed by electric companies on poles in the public rights-of-way without zoning, as shown in the photograph below, also from Newport News.



Small wireless facilities are consistent with such existing installations, as the photograph below of a Crown Castle node in Newport News demonstrates. Crown Castle's node is on the pole on the left side of the road, across from the line of poles that are of equivalent height. Indeed, at least one of those other poles has a group of large electric transformers.

The photograph below shows an ExteNet node in San Francisco surrounded by equivalent sized poles and equipment. None of the other equipment was required to obtain any site-specific permit from the City. The small wireless facility is on the pole in the center of the photograph. The pole on the left of the photograph has another company's equipment box and an electric transformer, and the pole across the street on the right side of the frame also has another company's equipment box.


(ExteNet node in San Francisco, on first pole; all other poles' equipment is electric or other telecommunications).

These photographs confirm that small wireless facilities, as defined by WIA and others, including the Commission, are similar to other ubiquitous facilities installed in the public rights-of-way—a fact confirmed by at least two courts.[76] The small wireless facilities are the same size and type as all the other right-of-way equipment and raise no unusual or unique concerns.

Below are additional examples of small wireless facility installations that blend seamlessly with the existing infrastructure.

[76] *Crown Castle NG Atlantic, LLC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *13 (E.D. Va. Aug. 8, 2016) ("Although the equipment differs in function, the equipment installed by Verizon, Dominion, and Cox is often similar in size and sometimes larger than the equipment attached at each of Crown Castle's four Node locations."); *T-Mobile W. Corp. v. City & Cty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cty. Nov. 26, 2014) ("The pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T.").

(AT&T installation on existing utility pole in Los Angeles with electric distribution and other telecommunication installations)

(AT&T installation in Hunter Mill, VA)

(AT&T node on municipal light pole in Manhattan)

(The previous two photos show AT&T nodes on San Francisco light poles)

Clearly, the local government desire to impose zoning regulations on small wireless facilities in the public rights-of-way is not nondiscriminatory management of the public rights-of-way. It is essentially unheard of for local governments to require non-wireless telecommunications providers, electric companies, or cable operators to go through a zoning

process to obtain approval for their installation of equipment in the public rights-of-way.[77] Even the utility poles themselves are generally not subject to zoning review.[78] A classic example of the treatment of all other right-of-way users compared to small wireless facilities was found by the court in *Crown Castle NG Atlantic LLC v. City of Newport News*, where the court held that "the City has not required Verizon, Cox, or Dominion to obtain zoning approval or conditional use permits in order to place their equipment on utility poles located in the City's public rights of way or replace the utility poles they already own."[79] This despite the fact that "[a]lthough the equipment differs in function, the equipment installed by Verizon, Dominion, and Cox is often similar in size and sometimes larger than the equipment attached at each of Crown Castle's four Node locations."[80]

Rather, as discussed more below, local governments seek to regulate based on a reflexive response to the inclusion of "wireless" equipment. Indeed, several municipal commenters are candid in admitting that fears of RF emissions, albeit unfounded and preempted from consideration by the 1996 Act, are a significant driver of local scrutiny and opposition to small wireless facilities.[81]

The Siting Coalition asserts that cities regulate based on "characteristics" not "technology,"[82] but that is demonstrably false. Similarly, the Siting Coalition's assertion that

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[77] WIA Comments at 45; *see also* Crown Castle Comments at 14, 23; ExteNet Comments at 9; Lightower Comments at 8.

[78] *See, e.g., City of Newport News*, 2016 WL 4205355, at *7 (noting that utility pole owners not required to obtain zoning approval to install or replace poles in right-of-way).

[79] *Id.* at *8.

[80] *Id.* at *52.

[81] *See, e.g.*, Montgomery County Maryland Comments at 28-33; Siting Coalition Comments at 48.

[82] Siting Coalition Comments at 14-15.

zoning codes provide sufficient "flexibility" to distinguish among facilities is simply wrong. Local governments are rigidly applying zoning laws written for tall towers to effectively prohibit deployment of small wireless facilities. As chronicled in WIA's opening comments, WIA's members regularly encounter zoning provisions that apply solely because of the existence of an antenna or the provision of personal wireless service. The "characteristics" of the equipment are irrelevant. As a result, companies are stuck in untenable situations where the local government will deny installation of a small wireless facility unless the company can satisfy the criteria for a variance from a patently absurd requirement, for example, to install an eight-foot-tall fence around the utility pole (that the city now deems a "tower") or to maintain a certain setback from the public rights-of-way itself.[83]

3. Small Wireless Facilities Are as Safe as Any Other Rights-of-Way Installation

Local government commenters also allege that there are significant safety concerns raised uniquely by small wireless facilities in the public rights-of-way.[84] However, again, the basis for those claims is a few specific instances involving installation of new 75 to 120-foot-tall poles. For example, the Siting Coalition includes a report from a Michigan county roadway engineer, Mr. Steven Puuri, who asserts that installation of new small wireless facilities in the public rights-of-way leads to "unnecessary hazards" and significant safety concerns.[85] But Mr. Puuri's examples all concern installation of new 75 to 120-foot-tall poles.[86] Mr. Puuri does not explain or discuss why small wireless facilities on poles are any more dangerous than the millions of

[83] WIA Comments at 9-10; *see also* Lightower Comments at 8.

[84] *See, e.g.*, Community Wireless Consultants Comments at 3; Siting Coalition Comments at 29; Town of Hempstead Comments at 3, 5, 8.

[85] Siting Coalition Comments Exhibit 4, Report of Steven Puuri.

[86] *Id*. (listing documents reviewed).

existing utility and street light poles that exist with various other types of communications and utility equipment attachments. Indeed, there is no evidence on this record of safety problems unique to installations that fall within the WIA definition of small wireless facilities.

WIA does not dispute that to the extent that new poles are necessary they must comply with standard, generally applicable engineering regulations. But the fact that wireless equipment, as opposed to some other technology, is being attached does not justify any special scrutiny or regulation by local governments.

4. "Agreements" and Allegedly Cooperative "Model" Ordinances Cited by Cities Do Not Reflect Reasonable Access

Several local government commenters point to allegedly cooperative model ordinances or agreements as evidence that local governments are reasonable and working with industry.[87] Although WIA appreciates the efforts of local governments and always looks to work with local government to facilitate the deployment of wireless infrastructure, the agreements and ordinances discussed by some commenters are not a substitute for Commission action. The mere fact that a provider or providers have executed an agreement with a local government does not mean the terms and conditions are reasonable. Far too often, such agreements are the result of multi-year delays and reflect the fact that providers have little or no alternative. Providers must either accept the local government's demands or they will not be able to provide service.

For example, the City of San Antonio agreement is cited by some municipal commenters as supposed evidence of reasonable local action.[88] Yet a WIA member reports that it was

[87] *See, e.g.*, City of Houston Comments at Exhibit A; NLC Comments at 8-9; Cities in Washington State Comments at 3; Texas Municipal League Comments at 18-19; Georgia Municipal Ass'n Comments at 3-4; Illinois Municipal League Comments at 2; City and County of San Francisco Comments at 9; San Antonio Coalition Comments at 9.

[88] Texas Municipal League Comments at 19; NLC Comments at 5.

presented with a "take it or leave it" agreement by the City of San Antonio that contains at least one objectionable provision that would prevent the agreement from conforming to the passage of any new state legislation. The city's agreement imposes fees that are eight times the amount of the fees proposed by pending legislation in Texas. The city has strongly opposed the legislation in its lobbying efforts, and it crafted its "take it or leave it" agreement to prevent the fee limitations in the pending legislation from governing the agreement if the legislation is passed. Accordingly, the WIA member is faced with the decision to either capitulate to the city's objectionable agreement and exorbitant fees to expeditiously move forward with its deployment or to wait out the legislative session (and thus delay its deployment) to see if the pending legislation passes before resuming negotiations with the city. The 1996 Act did not intend for cities to exert leverage in such a manner; this example further supports the need for Commission action in this proceeding.

The Georgia Municipal Association remarks in its comments that it has developed a Master ROW Agreement (MRWA) and Communications License Agreement to help facilitate small cell infrastructure deployment on City owned utility poles.[89] The MRWA, however, has been designed to accommodate the construction plans for Mobilitie. Mobilitie's plans are not representative of the construction plans for other entities, and the MRWA should not be considered a template for the deployment of a small cell network.

5. Small Wireless Facilities Do Not Adversely Affect Property Values

The Siting Coalition asserts that local governments are justified in their prohibition on deployment on small wireless facilities because, allegedly, small wireless facilities have

[89] Georgia Municipal Ass'n Comments 3-4.

"significant, negative impacts" on property values.[90] In support of their assertion, the Siting Coalition submits a "Report" by a Michigan appraisal company.[91] The Report did not perform a specific appraisal, but merely a "literature scan," and it admits that studies have dealt with "conventional, larger towers and not DAS installations."[92] Ultimately, it admits that "there have not been any scientific studies of the impact on property values from small cell and DAS deployments" and relies, fundamentally, on the author's 32 years of experience and "anecdotal examples."

The Siting Coalition's Report is contradicted by at least one publicly available study performed of the impact of wireless facilities—including small cells on utility poles—in proximity to residential properties. In November 2012, the Wireless Communications Initiative partnered with the Santa Clara County Association of Realtors, the Silicon Valley Association of Realtors, and MLS Listings to produce a study of the actual effects of wireless facilities on property values.[93] The study used over 1,600 single-family home transactions over a nine-month period in 2012 and seventy wireless sites in Palo Alto, Saratoga, and San Jose, California. The study included all types of wireless facilities, including (a) a wireless tower, (b) equipment placed on buildings, and (c) equipment placed on utility poles. The transactions were grouped by those (1) within one eighth of a mile, (2) one eighth to a quarter mile, and (3) a quarter to one-half mile. The study demonstrated that the distance from a wireless facility had no apparent impact on property values. It concluded that the relationship between the list and sale price

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[90] Siting Coalition Comments at 7, 10.

[91] *Id.* Exhibit 3.

[92] *Id.*

[93] JOINT VENTURE SILICON VALLEY NETWORK, WIRELESS FACILITIES IMPACT ON PROPERTY VALUES (2012), http://jointventure.org/images/stories/pdf/WirelessFacilitiesImpactOnPropertyValues.pdf.

remained the same no matter how close the property was to the wireless facility. In addition, it found that all the cities in the survey had similar results.

Notably, the Wireless Communications Initiative report addressed the fundamental error in the "accepted wisdom" of real estate professionals, such as the Siting Coalition's report, stating:

> Most real estate professionals believe there are multiple factors that affect property values. These professionals still believe in the old adage that there are three factors: location, location, location. However, it is quite obvious that the overall economic climate can have an overriding effect on the real estate market.[94]

The arguments of the Siting Coalition are based on anecdotes and real estate mythology. The Commission should disregard the assertions.

6. Cities Reveal Their Desire to Dictate Technology and Control the Market

Rather than limiting themselves to legitimate rights-of-way management, local governments' comments reveal their desire to dictate technology and even manipulate the market. For example, as noted above, the Siting Coalition's Afflerbach Report is example of cities trying to tell companies to use different technologies—directly contrary to the 1996 Act.[95]

Other comments further reveal how local governments are positioning themselves to participate in and manipulate the market. For example, the City of Minneapolis asserts in its comments that its process for regulating small wireless facilities is reasonable. The comments assert that the Minneapolis Code allows "ministerial" permits for wireless facilities, with no zoning, but the language is carefully crafted.[96] The city's comments state that the Minneapolis

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[94] *Id*. at 5.

[95] Siting Coalition Comments Exhibit 1.

[96] Minneapolis Comments at 3.

Zoning Code "no longer requires zoning approval for communications facilities that are located on public infrastructure in the right of way pursuant to Chapter 451 of the Minneapolis Code of Ordinances," but that "[c]ommunications towers and other communications facilities that are . . . not on public infrastructure are regulated under the Minneapolis Zoning Code."[97] In other words, *if the facility is attached to a city owned pole*, there is no zoning, but all wireless equipment attached to non-city owned poles must get right-of-way permits and zoning authorization. Effectively, the city is manipulating the market to drive users onto its poles. And although an easy process to use municipal poles would be appreciated, it would need to be constrained by clear limits on the fees and conditions a city can impose.

Similarly, the City of New York has at times been identified as a city that has made its light poles available for small wireless facilities. But the situation is not so simple. The city prohibits privately owned poles in Manhattan, so the only way to access the public rights-of-way is to use city-owned poles. The city in turn has imposed a process whereby priority of access to city-owned poles is auctioned off to the highest bidder.[98] New York's scheme is inherently discriminatory against any new entrant company, and fundamentally inserts the city to profit from its control over the public rights-of-way.

The City of Los Angeles similarly exposes an apparent intention to manipulate its access to the public rights-of-way to enter the market against private participants. The Siting Coalition notes that the City of Los Angeles has deployed "SmartPole" technologies, which turn street lights into hubs for existing and future wireless technologies.[99] In other words, Los Angeles has

[97] *Id.* at 3-4.

[98] City of New York Comments at 4.

[99] Siting Coalition Comments at 10.

deployed infrastructure that it can market as hubs for wireless technologies. Although there is no discussion of what Los Angeles has done with those poles, it shows that local governments are positioned in a way that raises significant concerns about their dual role of regulator and market participant. As the Minneapolis example shows, a local government can easily make deployment on privately owned poles radically more difficult (and ultimately subject to the city's own approval) compared to access to poles that it owns. Such discrimination distorts the market and contradicts the role envisioned by Congress in the 1996 Act.

7. Cities Seek to Second Guess or Reject Companies' Regulatory Status

Another significant impediment to the provision of telecommunications service that WIA's members have encountered is the strategy of many local governments to second guess or outright reject the company's regulatory status. These cities then deny that the company has any rights under federal or state laws. The cities reveal this phenomenon when, for example, they argue that Mobilitie "and others like it" are not telecommunications providers—notwithstanding the fact that the companies have been certified by the relevant state Commission to provide telecommunications services.[100]

Even if not part of an intentional strategy, the issue is a common problem. Local governments are not experts in the complex modern telecommunications ecosystem, and there is no reason for them to be. State public utility commissions and the Commission are expert agencies tasked with overseeing entry by the many varieties of telecommunications service providers. State commissions exercise that role by issuing certificates authorizing companies to engage in the provision of telecommunications services. However, because local governments do

[100] *See, e.g.*, Florida Coalition Comments at 14; Pennsylvania State Ass'n of Township Supervisors Comments at 9; Cityscape Consultants Comments at 3-4; National Ass'n of Regulatory Utility Commissioners ("NARUC") Comments at 11.

not understand complex telecommunications market or do not like the rights given to companies that provide telecommunications services, WIA members face city-by-city battles over claims that they are not telecommunications service providers, even if they have been issued certificates by the state commission or hold licenses from the FCC. These disputes regarding fundamental legal or regulatory status are a significant impediment to deployment.

The Commission should reiterate that it is not the role of local governments to second guess or challenge the regulatory status of every new provider or technology. Numerous courts have held that Section 253 prohibits cities from second guessing the status and qualifications of providers in situations where the state commission has already granted the company authority.[101] These arguments by local governments have nothing to do with managing the public rights-of-way.

In a similar situation, the Commission has held that a Certificate of Public Convenience and Necessity from a state commission is prima facie proof that the company is a telecommunications service provider. Specifically, in *Fiber Technologies Networks, LLC v. North Pittsburgh Telephone Co.*, the Commission held that the attaching party met its burden to show that it offers telecommunications service by proving that it held a Certificate of Public Convenience and that it had filed the requisite tariffs. [102] The Commission explained that a state

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[101] *See, e.g., TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 81 (2d Cir. 2002) (invalidating local requirements targeting qualification to provide telecommunications service); *Qwest Commc'ns Corp. v. City of Berkeley*, 255 F. Supp. 2d 1116, 1123 (N.D. Cal. 2003) ("[I]t is not the arena of the City of Berkeley to determine the common carrier status of Qwest or any other communications provider."), *aff'd*, 433 F.3d 1253 (9th Cir. 2006**)**; *City of Dallas*, 8 F. Supp. 2d at 593 (holding that company's qualification to provide telecommunications service is certificated by the state public utility commission and "may not be second-guessed by the City"); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471 (N.D.N.Y. 2003).

[102] *Fiber Tech. Networks, LLC v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 3392, 3392-96 ¶¶ 2, 6, 10 (E.B. Feb. 23, 2007).

commission's decision to grant a certification "reflect[s] judgments by an expert regulatory agency that the services set forth in Fibertech's Tariff constitute 'telecommunications services'. . . Such judgments suffice to establish a *prima facie* case."[103] Furthermore, and more broadly, the Commission held that "attachers are entitled to rely on decisions by responsible regulatory agencies, such as . . . public utility commissions in the case of telecommunications carriers, in establishing their status as entities entitled to pole access under Section 224(f) of the Act."[104] The same conclusion should apply when companies seek to deploy small wireless facilities in the public rights-of-way. Local governments should not be second-guessing the legal status of the company or their facilities.

The Commission should also reiterate that the cities' argument is ultimately irrelevant. In *State of Minnesota*, the Commission rejected arguments that the challenged agreement did not violate Section 253(a) because the company involved was an "infrastructure provider," stating:

> It is the Agreement's effect on the provision of telecommunications service that is critical, not whether the Agreement could be characterized as dealing with infrastructure development. . . . ***[B]y restricting who may deploy telecommunications infrastructure along freeway rights-of-way, the Agreement will have the effect of prohibiting certain entities from providing telecommunications services***.[105]

[103] *Id*. at 3396 ¶ 11.

[104] *Id*. at 3397 ¶ 15.

[105] *Petition of State of Minnesota for A Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd 21697, 21705 ¶ 14 (1999) (emphasis added); *see also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713 (1996) ("*New England Preemption Order*") ("Whether the state or local requirement affected the provision of telecommunications services was the important issue, not the purported subject matter of the restriction.").

It cannot be legitimately disputed that small wireless facilities are used to provide telecommunications services. Local government requirements would not be immune from Section 253(a) even if the company installing the facilities was not, itself, providing telecommunications services because the relevant issue is that by prohibiting the installation of "infrastructure," the local government is effectively prohibiting some entities from providing telecommunications services.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPRETING SECTION 253 AND SECTION 332

As set forth above, WIA's and other industry members' opening comments support the need for the Commission to issue a declaratory ruling. The cities' arguments against the Commission's jurisdiction and their interpretations of the 1996 Act are unavailing.

As set forth in WIA's opening comments, the Commission has authority to issue a declaratory ruling interpreting Sections 253 and 332, and issuing such a declaratory ruling is the appropriate vehicle for the Commission to clarify the law in this area.[106] Congress granted authority to issue declaratory rulings pursuant to Section 5(d) of the Administrative Procedure Act.[107] This authority has been upheld by courts on numerous occasions.[108]

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[106] *See, e.g., Shot Clock Order*, 24 FCC Rcd at 14016-18 ¶¶ 56-63 (rejecting Third and Fourth Circuits' "one provider" interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II)).

[107] 5 U.S.C. § 554(e) (stating that an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

[108] *Central Tex. Coop., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) ("47 C.F.R § 1.2 [is] a provision giving the Commission the authority to issue declaratory orders. Section 1.2 refers to § 554(e) of the APA, which . . . is a subsection of the provision governing formal adjudication. . . . [T]here is some authority to the effect that the declaratory ruling provision in § 554(e) may be used in informal adjudication."); *City of Arlington v. FCC*, 668 F.3d 229, 241

The Commission has previously acted pursuant to this authority to advance broadband deployment. Indeed, the Commission's authority to issue a declaratory ruling as to presumptively reasonable time frames under Section 332 has already been upheld.[109] Accordingly, there can be no doubt that the Commission possesses the authority to issue a further declaratory ruling interpreting the same provision. A declaratory ruling in this proceeding clarifying the scope of local authority under Sections 253 and 332 will fulfill the Commission's mandate to eliminate unnecessary regulation and promote the deployment of advanced telecommunications services by eliminating local regulations that prohibit competition and deployment.[110]

A. The Commission Has Authority to Issue a Declaratory Ruling Addressing Section 253

The arguments by some municipal commenters that the Commission lacks authority to act in this proceeding are misplaced. These commenters conflate adjudicatory proceedings and interpretive proceedings, and apparently misunderstand the nature of this proceeding. For example, one set of comments argues that the "FCC is precluded by statute from adjudicating rights of way disputes under Section 253(c)."[111] First, this proceeding is not an adjudicatory proceeding, let alone a proceeding about adjudicating any one dispute or preempting any one regulation by a single community under Section 253(d). Instead, the Commission proposes to

(5th Cir. 2012) ("Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA"), *aff'd*, 133 S. Ct. 1863 (2013).

[109] *City of Arlington*, 668 F.3d at 254.

[110] H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.) ("Conference Committee Report") (noting the primary purpose of the 1996 Act was to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .").

[111] Texas Municipal League Comments at 22; *see also* NARUC Comments at 12 ("Congress made clear that the reservation in § 253(c) is to be construed – if at all – by a court on a case-by-case basis."); City of New York Comments at 7-8 ("Congress intended that the courts, and not the commission, have jurisdiction over matters implicating local management of rights of way.").

issue guidance through an interpretive ruling addressing what local government requirements and actions are and are not permissible under Section 253. Such a ruling will guide local governments, telecommunications service providers, and courts to achieve a competitively neutral and nondiscriminatory regulatory environment to foster enhanced competition, as was the purpose of the 1996 Act.

Second, as the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board*, the Commission has broad authority to interpret the 1996 Act, and this authority extends beyond those provisions giving the Commission an adjudicatory role.[112] Even where Congress explicitly provided for a judicial remedy in a federal or state court, the Commission has the authority to issue interpretive rulings of the provisions of the Communications Act and its amendments (including the 1996 Act).[113] The Sixth Circuit addressed this precise issue in *Alliance for Community Media v. FCC.* In that case, the Commission released an order adopting rules interpreting and implementing Section 621(a)(1) of the Communications Act, which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises.[114] The petitioners seeking to overturn the Commission's order in that case argued that because Congress specifically provided for a judicial remedy under Section 621 and did not otherwise expressly reference the agency, the Commission lacked authority to issue the interpretive order.[115] The Sixth Circuit disagreed and, relying on *Iowa Utilities Board*, held that

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[112] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999).

[113] *See, e.g.*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 775 (6th Cir. 2008) (citing *Iowa Utils. Bd.*, 525 U.S. at 385 ("assignment[ ]" of the adjudicatory task to state commissions did not "logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments"); *City of Arlington*, 668 F.3d at 254.

[114] 47 U.S.C. § 541(a)(1).

[115] 529 F.3d at 773.

"the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of Section 621(a)(1)" and "the statutory silence in Section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision."[116]

A similar conclusion was reached more recently by the Fifth Circuit in the challenge to the Commission's *Shot Clock Order*, in which the Commission issued a declaratory ruling interpreting the language of Section 332(c)(7) regarding reasonable time frames for acting on wireless facility siting applications.[117] Relying on *Alliance for Community Media*, the Fifth Circuit concluded that "there is nothing inherently unreasonable about reading § 332(c)(7) as preserving the FCC's ability to implement § 332(c)(7)(B)(ii) while providing for judicial review of disputes under § 332(c)(7)(B)(ii) in the courts."[118] Indeed, even the cases cited by the municipal commenters reveal that courts turn to the Commission's interpretive rulings in resolving disputes under Section 253.[119]

Here, whether a future challenge to a local government regulation or action is brought in court or before the Commission pursuant to Section 253(d), the Commission's interpretation of the statute in this proceeding will serve as guidance for the outcome. And, importantly, the Commission's interpretation will proactively guide local governments in their review and

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[116] *Id.* at 774.

[117] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[118] *Id.* at 251 (internal quotation marks and citations omitted).

[119] *See, e.g.*, NARUC Comments at 12 (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004) (relying on the Commission's interpretation of the "competitively neutral" and "nondiscriminatory" requirements in Section 253(c)); *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1192 n.11 (11th Cir. 2001) ("As the federal agency charged with implementing the Act, the FCC's views on the interpretation of § 253 warrant respect.")).

processing of applications to deploy wireless facilities in the rights-of-way and will potentially avoid the need for piecemeal, reactive complaints filed against local governments before courts or the Commission.[120]

Indeed, in this case, the fact that Section 253(d) explicitly grants the Commission preemptive authority provides even greater authority for the Commission to provide an interpretive ruling as to what actions violate Section 253. Section 253(d) authorizes the Commission to preempt local regulations that violate Section 253(a) and (b), and so the Commission clearly has the authority to provide an interpretive ruling as to what types of local regulations are in violation of Section 253(a). Some local governments argue that because Section 253(d) does not include Section 253(c) in its grant to the Commission, the Commission lacks any authority whatsoever if local governments claim rights-of-way management. Even viewing Section 253(c) as a savings clause[121]—i.e., that local governments may invoke that section as a defense—the Commission necessarily has the authority to interpret Section 253(c) in the course of resolving whether a challenged requirement is preempted by Section 253(a). Otherwise, local governments could deny the Commission jurisdiction by merely alleging rights-of-way management as a defense.[122] Indeed, *TCG New York, Inc. v. City of White Plains*,

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[120] *Alliance for Cmty. Media*, 529 F.3d at 775 ("While the Order equips LFAs with guidance on reasonable versus unreasonable distribution of franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises.").

[121] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006); *see also* City and County of San Francisco Comments at 15 ("It is clear, however, that section 253(c) cannot be separated from the required finding that a local regulation has prohibited or effectively prohibited a telecommunications carrier from providing services, a finding that must be made under section 253(a).").

[122] This situation reveals the ambiguous nature of Section 253, as a whole, which further supports the Commission's authority to interpret it.

addressed the oddity of Section 253(d), confirming that "the plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption" and also that "because § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint."[123]

While adjudicatory proceedings pursuant to Section 253(d) will remain available for specific circumstances on a case by case basis, the Commission should cast a wider net through an interpretive ruling in this proceeding to settle the patchwork of local requirements that impede deployment. To require resolution of these pressing issues on a case-by-case, community-by-community, provider-by-provider basis would only perpetuate the problem exposed in the many industry comments—significant delays, unclear and inconsistently applied local processes, burdensome requirements and limitations, moratoria, and arbitrary and exorbitant fees when attempting to site wireless facilities in the rights-of-way.

Arguments that the Commission lacks an adequate record are also meritless. When certain local government commenters requested an extension of time to file reply comments,[124] they challenged the Commission's ability to render "data driven decisions" because some industry commenters provided examples of prohibitory practices by certain communities in an

[123] *City of White Plains*, 305 F.3d at 75-76.

[124] *See* Motion for Extension of Time to File Reply Comments filed by National Association of Telecommunications Officers and Advisors, the National League of Cities, the Government Finance Officers Association, the National Association of Towns and Townships, the National Association of Counties, the United States Conference of Mayors, the National Association of Regional Councils, and the International Municipal Lawyers Association, filed Mar. 23, 2017.

anonymous fashion. The local governments asserted that "doing so undercuts the credibility of any decisions the Commission may reach."[125] Communities seeking to challenge the Commission's decision in the Section 621 proceeding raised the same argument about "anonymous" examples and it was rejected. Specifically, in *Alliance for Community Media*, the Sixth Circuit held that the Commission's decision was "rooted in a sufficient evidentiary basis" despite arguments that record contained allegations against communities "which are anonymous, hearsay-based, inaccurate, and outdated."[126]

Certain industry commenters chose to anonymize the specific communities engaging in prohibitory practices due to the potential for retaliation from those communities. Local governments control the ability of industry members to do business and have subtle and not-so-subtle ways of responding if they are accused of bad actions. Indeed, one industry commenter noted that it has foregone the opportunity to file suit against certain jurisdictions for violation of the *Shot Clock Order* due to the "risk of potential repercussions occasioned by the threat of litigation."[127] Regardless whether the identities of certain communities were anonymized, the record is more than adequate to support a finding by the Commission that the operation of the right-of-way siting process has effectively prohibited the provision of telecommunications service.

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[125] *Id.* at 3.

[126] *Alliance for Cmty. Media*, 529 F.3d at 786.

[127] *See* Lightower Comments at 9.

B. Section 332(c)(7)(A) Does Not Deprive the Commission of Authority to Interpret Section 253 as Applied to Small Wireless Facilities

As WIA set forth in its opening comments, Section 253 is applicable to the deployment of telecommunications services that use wireless facilities, including small wireless facilities, in the rights-of-way.[128] As anticipated, however, some municipal commenters continue their argument that the language of Section 332(c)(7)(A) "forbids application of Section 253 to 'limit or affect' local authority over wireless siting decisions."[129] As WIA demonstrated, courts have rejected that argument, making clear that whereas Section 332(c)(7) governs the judicial review of a specific wireless siting application denial, Section 253 governs questions of whether municipal requirements in and of themselves exceed local authority over telecommunications services in violation of the Act.[130] Even if Section 332 is applicable, it is well-settled that the Commission has the authority to interpret that section through a declaratory ruling.[131] In *City of Arlington*, the Fifth Circuit made clear that nothing in Section 332(c)(7)(A) limits the Commission's authority to issue interpret and implement Section 332.[132]

Moreover, the "explanation" by one commenter that the reason "the Commission has never used its authority under Section 253(d) to issue a preemption order to preempt any state or

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[128] WIA Comments at 51-52.

[129] *See* San Antonio Coalition Comments at 11; *see also* Siting Coalition Comments at 52 ("What is clear is that where Section 332(c)(7) applies, Section 253 cannot."); City and County of San Francisco Comments at 17-18.

[130] *See* WIA Comments at 51-52 (citing *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *USCOC of Greater Mo., L.L.C. v. Village of Marlborough*, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009)); *see also Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007); *Town of Greenburgh*, 2013 WL 3357169, at *16-17.

[131] *City of Arlington*, 668 F.3d at 254.

[132] *Id.*

local action (or inaction) involving wireless facility siting" is because the Commission lacks authority to apply Section 253 in the wireless context is baseless.[133] The fact that no party has ever brought a complaint to the Commission pursuant to Section 253(d) in the wireless context has no bearing on the applicability of Section 253 to wireless facilities or on the scope of the Commission's authority to interpret the same. As discussed above, there can be no doubt that Section 253 *does* apply to wireless facilities and the Commission *does* have the authority to interpret Section 253 through a declaratory ruling.

C. The Record Supports the Need for a Commission Ruling Defining Municipal Actions that Effectively Prohibit the Provision of Telecommunications Service

As discussed above, the Commission has a clear record that local governments are effectively prohibiting the provision of telecommunications services through their treatment of small wireless facilities in the public rights-of-way. Delay beyond even the longest Commission shot clock is common. Many cities are imposing moratoria—either explicit or *de facto*—in response to applications to install small wireless facilities.[134] And many other cities are imposing extensive zoning or other discretionary requirements that discriminate against small wireless facilities and impose regulations that effectively prohibit the provision of telecommunications services. Indeed, as discussed above, cities make clear their desire and intention to regulate and control every aspect of the industry—in direct conflict with the 1996 Act. The Commission should rule that these actions violate Section 253.

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[133] *See* Siting Coalition Comments at 54.

[134] *See, e.g.*, ExteNet Comments at 5-6; Crown Castle Comments at 15-19; Lightower Comments at 10-11.

1. The Commission Should Emphasize That Local Requirements Need Not Be "Insurmountable" to Run Afoul of Section 253

Some local government commenters essentially argue that small wireless facilities have been deployed, so there is not a deployment problem, and *ipso facto* no prohibition of service caused by municipal regulation.[135] However, the fact that small wireless facilities have ultimately been constructed at some point does not address how long it took, the terms and conditions that the provider had to simply accept, how many proposals were rejected, or how many locations were never even attempted because of known local impediments. Nor does it address how many small wireless facilities could have been deployed were it not for the significant barriers chronicled in the record.

The 1996 Act explicitly favors deployment of new technologies and places the burden on local governments who stand to impede them.[136] And the 1996 Act imposed on the Commission an affirmative mandate to eliminate all local impediments to deployment, not just those that explicitly and completely prohibit all telecommunications services:

> section 253 expressly empowers -- indeed, ***obligates*** -- the Commission to remove any state or local legal mandate that "prohibits or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. ***We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service***.[137]

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[135] *See, e.g.*, Siting Coalition Comments at 35-36, 55.

[136] 47 U.S.C. § 157(a) ("[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest").

[137] *Texas PUC Order*, 13 FCC Rcd at 3470 ¶ 22 (emphasis added).

As WIA and others demonstrated, the Commission should take this opportunity to issue a declaratory ruling clearly articulating the standards limiting local government authority under Section 253 and Section 332(c)(7) of the Act.

First, WIA and others demonstrated that the Commission should clarify the standards governing local government treatment of small wireless facilities under Section 253.[138] The record demonstrates that some recent court decisions incorrectly interpreted Section 253(a), imposing an extremely limiting standard that is inconsistent with the language and intent of the 1996 Act, as previously articulated by the Commission and courts.[139] Accordingly, the Commission should declare that the Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*,[140] and other similar cases that adopted and enforced the Commission's *California Payphone* standard under Section 253, were correct, and that the restrictive interpretations adopted by the Eighth Circuit in *Level 3 Communications, L.L.C. v. City of St. Louis*[141] and the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*[142] were incorrect.

Specifically, the Commission should declare that Section 253(a) is not limited to outright, "insurmountable," or explicit prohibitions on service, but is violated by any state or local requirements that: (1) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment;" or (2) imposes

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[138] WIA Comments at 25-50; CTIA Comments at 19-28; ExteNet Comments at 20-42; Crown Castle Comments at 24-32; Verizon Comments at 11-17; AT&T Comments at 6-24.

[139] WIA Comments at 34-39; CTIA Comments at 24-25; ExteNet Comments at 28-29; Verizon Comments at 11-13; AT&T Comments at 6.

[140] 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

[141] 477 F.3d 528, 532 (8th Cir. 2007).

[142] 543 F.3d 571 (9th Cir. 2008).

requirements that in combination or as a whole impede the provision of any telecommunications service, including but not limited to requirements that leave local governments unfettered discretion over applications, significantly increase cost, and impose lengthy or onerous application processes.[143] Moreover, the Commission should explicitly declare that imposing regulations and requirements on small wireless facilities that are not imposed on other telecommunications equipment installed on poles in the public rights-of-way is a barrier to entry, and is not reasonable or competitively neutral and nondiscriminatory management of the public rights-of-way. The Commission should further declare that local government requirements that exercise unfettered discretion over whether a small wireless facility network is deployed also have the effect of prohibiting telecommunications service and are not within local governments' Section 253(c) authority to manage the public rights-of-way. Finally, the Commission should make clear that unreasonable delay is a prohibition of telecommunications service in violation of Section 253, in addition to violating Section 332(c)(7)(B)(ii).[144]

Comments from local governments relying on *Level 3* and *Sprint* demonstrate the need for such a ruling, as the local governments take those cases to mean that since some small wireless facilities have been deployed there can be no Section 253(a) violation.[145] Other comments, such as the Virginia Joint Commenters, misstate the application of the *California*

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[143] *See, e.g.*, *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000), *aff'g Silver Star Tel. Co.*, 12 FCC Rcd 15639 (1997), *recon. denied*, 13 FCC Rcd 16356 (1998); *City of White Plains*, 305 F.3d at 76; *Iowa Utils. Bd.*, 525 U.S. at 371 (1996 Act "fundamentally restructures local telephone markets. States may no longer enforce laws that ***impede*** competition . . . ." (emphasis added)); *City of Auburn*, 260 F.3d at 1175-76.

[144] Lightower Comments at 20-22.

[145] *See, e.g.*, Siting Coalition Comments at 55 (citing *Level 3* to support the argument that because there have been small wireless facilities deployed "there is no reason to find either a direct or effective prohibition, ***or even the possibility of a prohibition***" (emphasis added)).

Payphone standard.[146] As WIA explained, although the Eighth Circuit acknowledged the *California Payphone* decision, the Eighth Circuit's holding and actual analysis is clearly contrary to *California Payphone* as applied by the First, Second, and Tenth Circuits (and by the Ninth Circuit originally in *City of Auburn*).[147] Those municipal comments emphasize WIA's point that *Level 3* and *Sprint* have had a significant chilling effect on deployment, and absent Commission action, local governments are emboldened to impose significant, discriminatory barriers to the provision of telecommunications service in violation Section 253.

Local government comments also emphasize the need for the Commission to clarify that Section 253(a) preempts more than just total bans.[148] The Commission and courts have consistently ruled that local requirements need not be insurmountable to violate Section 253(a).[149] Requirements that impose substantial additional costs, for example, violate Section 253(a). In the *Texas Preemption Order,* the Commission found that certain requirements would have the effect of prohibiting certain carriers from providing any telecommunications service contrary to Section 253(a) because of "*the substantial financial investment*" required to meet those requirements.[150]

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[146] Virginia Joint Commenters Comments at 39-40.

[147] WIA Comments at 35.

[148] *See, e.g.*, Siting Coalition Comments at 51 (arguing that to constitute a prohibition the regulation must "formally forbid" and that a "hindrance" does not rise to the level of a Section 253(a) violation).

[149] *See, e.g., RT Commc'ns*, 201 F.3d 1264; *City of White Plains*, 305 F.3d at 76.

[150] *Texas Preemption Order*, 13 FCC Rcd at 3488 ¶ 78; *see also* Verizon Comments at 11-12.

2. The Commission Should Clarify the Effective Prohibition Standard of Section 332(c)(7)(B)(i)(II)

The Commission should also use this opportunity to clarify the standards under Section 332(c)(7)(B)(i)(II). In its comments, WIA explained why the traditional, judge-made standard for "effective prohibition" claims, which requires a showing of a "significant gap" in service and some ruling out of alternatives, was inappropriate and unworkable in the context of multi-node small wireless facility networks.[151] Verizon further articulated why the Commission should now reject the "significant gap" or "alternatives" standard altogether as anachronistic, contrary to the 1996 Act, and out of step with technological developments.[152]

The importance of clarifying this issue is demonstrated by local government comments that suggest small wireless facilities are only to "improve" service quality and thus there can never be a gap in service to support an "effective prohibition" of service.[153] Although the significant gap test is inappropriate for the reasons that WIA and Verizon have articulated, even if it applies, the Commission should make clear that a significant gap exists wherever a provider lacks adequate signal strength to provide in-building service ***or*** lacks adequate network capacity.[154] It is well-established from an RF engineering standpoint that lack of capacity leads to the same type of gap in service that a consumer would experience if there were inadequate

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[151] WIA Comments at 53.

[152] Verizon Comments at 21-22.

[153] Siting Coalition Comments at 26.

[154] *T-Mobile Cent. LLC v. City of Fraser*, 675 F. Supp. 2d 721, 728 (E.D. Mich. 2009) (recognizing that lack of capacity amounts to significant gap); *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 90 F. Supp. 2d 557, 565 (D.N.J. 2000) (same).

signal "coverage."[155] In both cases, the consumer will not be able to make or maintain a mobile connection in the manner they expect and demand.

This is another example where local governments seek to insert themselves as arbiters of technology and business needs and to manipulate the judicially-created "significant gap" test to limit deployment. If allowed to be applied to small wireless facilities, local governments would force providers to prove that there is a gap in service on a node-by-node basis. But that very standard was premised on a technology as it existed twenty years ago and is inappropriate in the context of a small wireless facility in the public rights-of-way. WIA supports the proposal by T-Mobile and Verizon for the Commission to clarify that cities are not allowed to require a showing of "need" or other business basis for deployment of wireless facilities.[156]

D. The Commission Should Issue a Declaratory Ruling to Prevent Municipalities from Abusing Their Control over the Public Rights-of-Way for Unreasonable and Discriminatory Fees

1. The Comments Make Clear Cities Seek to Profit from Deployment of Small Wireless Facilities

Numerous municipal comments reveal the desire of local governments to generate revenue from small wireless networks. Non-cost based fees effectively prohibit the delivery of telecommunications service in a fair and balanced legal and regulatory environment, and should be preempted under Section 253(c).

For example, the City of Austin argues that cities are required "to act as landlords, rather than regulators,"[157] seeking the highest fees they can extract. Combined comments of the City of

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[155] *Id.*

[156] T-Mobile Comments at 19; Verizon Comments at 21-22.

[157] City of Austin Comments at 8.

San Antonio and other communities likewise argue that they should be allowed to set their prices like private landlords—by definition charging whatever they can get away with.[158] The Georgia Municipal Association argues that municipalities should charge fair market value defined as "what it would cost the user . . . to purchase access from a private property owner."[159] The Siting Coalition goes so far as to say that *any* FCC regulation of the prices they charge small wireless networks "is bad policy," building an argument on the fallacy that the public rights-of-way are no different than any form of property.[160] The Texas Municipal League characterizes its desire for unregulated monopoly rents at "value-based street rental fees."[161]

However these and other municipal commenters try to preserve the power to extract the maximum revenue from wireless providers, the underlying motive is plain. Their interest is in money without federal interference, and their demands stand as a significant, and often permanent, structural barrier to telecommunications deployment and competition.

2. Cities Do Not Control Public Rights-of-Way as Private Property Owners

A fundamental problem with the cities' position is that it is premised on a false version of the role of local governments regarding the public rights-of-way. A significant number of local government comments assert that cities hold the public rights-of-way in a "proprietary" capacity, as if they were private property owners.[162] That assertion is baseless. Local governments hold the

[158] *See, e.g.*, San Antonio Coalition Comments at 26-27.

[159] Georgia Municipal Ass'n Comments at 5.

[160] Smart Siting Coalition Comments at 37.

[161] Texas Municipal League Comments at 11.

[162] *See, e.g.*, San Antonio Coalition Comments at 14-15; Texas Municipal League Comments at 6-9; Arizona Coalition Comments at 3-10.

public rights-of-way in trust for the public, not as private or proprietary land owners.[163] For example, in *Texas Department of Transportation v. City of Sunset Valley*, the Supreme Court of Texas rejected the city's argument that it was entitled to compensation under the Texas Constitution because it held legal title to the roads taken.[164] The court emphasized that in its prior cases it held that "even though legal title was taken in the county's name, title was held for the benefit of the State and the general public."[165] In *City of Mission v. Popplewell*, the Supreme Court of Texas was even more direct, stating that "Courts everywhere decline to recognize that the city possesses any property rights in the streets . . . ."[166] Such decisions are common.[167] For example, in the context of telecommunications deployment, the Illinois Supreme Court held that:

> [m]unicipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public. While numerous powers and rights regarding public streets have been granted to municipalities by the General Assembly, they are all regulatory in character, and do not grant any authority to rent or to lease parts, or all, of a public street.[168]

Despite this basic principle—that government owns public ways in the public interest—several municipal comments rely on the 1893 United States Supreme Court decision in *St. Louis v.*

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[163] *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (S.D.N.Y. 2004) (holding that City's requirements and fees for use of city-owned poles "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

[164] *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644-45 (Tex. 2004).

[165] *Id*.

[166] *City of Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) ("The city controls the streets as trustee for the public. It has no proprietary title nor right to exclusive possession.").

[167] *See, e.g., Cotrone v. City of New York*, 237 N.Y.S.2d 487, 489 (N.Y. Sup. Ct. 1962); *AT&T Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1042 (Ill. 1993).

[168] *Arlington Heights*, 620 N.E.2d at 1042.

Western Union as supposedly authorizing them to charge "rent" for use of the public rights-of-way.[169] Their reliance is misplaced.

In *City of St. Louis*, the city had passed an ordinance that imposed a $5 annual fee on each pole erected or used by a telephone or telegraph company.[170] The Supreme Court initially held that a per-pole fee was not *per se* an impermissible tax on commerce because "[t]he amount to be paid is *not graduated by the amount of the business*, nor is it a sum fixed for the privilege of doing business."[171] Thus, even though not *per se* invalid, a municipal fee for use of the right-of-way could only survive if it was based on the extent of the use.[172]

The Supreme Court itself reconsidered the same case two months later and *abandoned* the concept of municipal "rent" altogether as a basis for its holding.[173] Although the Court did not explain the reason for its reconsideration of the rationale underlying its decision, the second opinion upheld the city's per-pole charge not as "rent," but as an exercise of the city's charter power "to license, tax and regulate . . . telegraph companies. . . ."[174] The Court explained that "*it is only a matter of regulation* of use when the city grants to the telephone company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it had to bear," and concluded that "the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power *to regulate the*

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[169] *City of St. Louis* v. *Western Union Tel. Co.*, 148 U.S. 92 (1893).

[170] *Id.* at 94.

[171] *Id.* at 97 (emphasis added); *see also id.* at 98 (emphasizing that "this is not a tax upon the property of the corporation, *or upon its business*, or for the privilege of doing business") (emphasis added).

[172] *Id.* at 105.

[173] 149 S. Ct. 465, (May 15, 1893).

[174] *Id.* at 468.

use."[175] Thus, despite what municipal commenters would have the Commission believe based on the first *St. Louis* opinion, the Supreme Court did not rule that all cities have a proprietary interest in their rights-of-way that allows them to charge rent for the use of those public ways as if they were private property.[176]

Moreover, in a number of cases after *City of St. Louis*, the Supreme Court further retreated from the "rent" theory of the initial decision and made clear that the extent of local compensation is limited. The Supreme Court held that a municipality could seek compensation "for the special *cost of supervising and regulating* the poles, wires and other fixtures and of issuing the necessary permits,"[177] so long as "the charge made is reasonably proportionate to the service to be rendered [by the city] and the liabilities involved . . . ."[178] In *Western Union Tel. Co.* v. *Borough of New Hope*, the Court held "[c]learly the reasonableness of the fee is *not* to be measured *by the value of the poles and wires or of the land occupied, nor by the profits of the business*."[179] Thus, the *St. Louis* case does not support municipal commenters' assertions.

Likewise, there is no merit to local government arguments that they are required to demand the highest payment they can because they may not provide use of the public rights-of-

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[175] *Id.* at 470 (emphasis added).

[176] A more detailed analysis of the many flaws in municipal reliance on *St. Louis* can be found in Gillespie, *Rights of Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209 (Fall 2002).

[177] *Mackay Tel. & Cable Co.* v. *City of Little Rock*, 250 U.S. 94, 99 (1919) (emphasis added).

[178] *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 260 (1919).

[179] *Western Union Tel. Co.* v. *Borough of New Hope*, 187 U.S. 419, 426 (1903) (emphasis added) (internal quotation omitted); *see also New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessment*, 280 U.S. 338 (1930) (striking down a franchise tax of up to five percent of the gross receipts of a telephone company).

way as a "gift."[180] For example, in *Southwestern Bell v. City of El Paso*, the court held that the Texas Constitution's "anti-gift" provision did not prohibit cities from granting access to the public rights-of-way without compensation. The court held that "[t]his [anti-gift] provision is inapplicable to grants of public money or things of value to serve a public interest. The provision of telephone service has been determined to be of public value and in the public interest. Therefore, a law permitting a telephone company to use public streets for its lines does not violate the Texas Constitution."[181]

The Commission should particularly put to rest the assertion that local governments can charge "fair market value" for use of the public rights-of-way.[182] The fundamental flaw in municipal arguments for "market based" compensation for use of the rights-of-way and existing utility or light poles is that there is simply no such market. If a small wireless facilities operator fails to accept the demands made by a local government, the carrier has no choice but to abandon the project. There is no second or third set of established utility corridors intended for installation of communications equipment on poles. And as AT&T explains, private property is not a feasible alternative.[183] Unlike macro sites, where a single tall tower can serve a fairly large surrounding area, and thus, access to individual parcels of private property may be feasible, small wireless facilities cover such small areas that the number of private property sites would be prohibitory.[184] Assertions to the contrary, for example by the San Antonio Coalition, are

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[180] Siting Coalition Comments at 58 & n.120; Texas Municipal League Comments at 9-13.

[181] *Southwestern Bell v. City of El Paso*, 168 F. Supp. 2d 640, 645 (W.D. Tex. 2001).

[182] Cities in Washington State Comments at 9; San Antonio Coalition Comments at 23; Texas Municipal League Comments at 9-11.

[183] AT&T Comments at 10.

[184] *Id.*

premised on a mistaken and simplistic view that just because "wireless facilities can be—and historically almost exclusively have been—placed on private property,"[185] they must forever remain on private property. Despite conceding that the public rights-of-way are "unquestionably an essential facility for landline service,"[186] such comments simply ignore the technological and practical realities that put small wireless facilities in the same position as landline facilities. Traditional wireline telecommunications companies almost universally are granted the power of eminent domain, but it is understood that having to negotiate with or use eminent domain against multiple property owners would be completely impractical and would thwart deployment of a service that is in the public interest. Small wireless facilities are in the same position.

Cities even recognize that fees directly impact the deployment of telecommunications facilities. The Maryland Municipal League's comments address deployment of small wireless facilities as if it were a commodity that cities are allowed to manipulate through the fees they charge. The Maryland Municipal League asserts that "[d]esire for service is a huge incentive for cities to charge competitive access fees; ***charge too much and the technology moves to another city, charge too little and the number of deployments becomes burdensome***."[187] This approach is inconsistent with the vision of the 1996 Act to remove local government barriers to infrastructure investment. Cities are not granted the authority to decide if deployment becomes too "burdensome" for the City and thus try to intentionally limit deployment with fees and regulations.

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[185] San Antonio Coalition Comments at 13.

[186] *Id.*

[187] Maryland Municipal League Comments at 2 (emphasis added).

Ultimately, the fundamental reason why cities cannot demand "fair market" "rent" is because of the unique nature of how they hold the public rights-of-way. Local governments are arms of the state, and the public rights-of-way are a public common good that local governments are not entitled to profit from.[188]

3. "Proprietary" Ownership of Poles or Rights-of-Way is Irrelevant under Sections 253 and 332

A common refrain in local government comments focuses on the label of "proprietary," as if application of that term exempts city-owned poles or even public rights-of-way from preemption under Sections 253 or 332.[189] However, the cities' focus on the "proprietary" label is misplaced. The relevant legal issue is that cities are exercising their governmental authority.

Contrary to the cities' comments, courts have not held that Sections 332 and 253 do not apply to "proprietary" interests. At most, Section 332 cases have drawn a distinction based on the specific reference in Section 332(c)(7) to "regulation" to hold that the Act does not apply unless the local government is acting in its "regulatory" capacity.[190] But cities can exercise regulatory authority even over property they own, and in such situations, be subject to Section 332.

Section 253 is even broader. Section 253(a) applies to any local government legal requirement. While Section 332(c)(7)(B) addresses municipal "regulation" of personal wireless

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[188] An extensive discussion of the historic basis for limiting local government fees for use of the public rights-of-way can be found in Gillespie, *supra* note 176.

[189] *See, e.g.*, San Antonio Coalition Comments at 14-15; Texas Municipal League Comments at 6-9; Arizona Coalition Comments at 3-10.

[190] *See, e.g.*, *NextG Networks of N.Y., Inc.*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (holding that City's requirements and fees for use of city-owned poles "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

services, Section 253(a) preempts any "regulation, or any other . . . legal requirement. . . ."[191] Thus, whether the city's actions are "regulatory" or not is irrelevant under Section 253.

In *State of Minnesota*,[192] the Commission addressed an attempt by the State of Minnesota to enter into an agreement granting to a single entity the exclusive right to construct fiber in the State's rights-of-way. The State argued that the agreement was not a "legal requirement" under Section 253(a), and thus not within the limitations of the statute. The Commission rejected the argument, interpreting the scope of Section 253(a)'s "legal requirement" language to be broad, and specifically holding that Section 253(a) does not limit its preemptive effect to "regulations":

> We conclude that Congress intended that the phrase, "State or local statute or regulation, or other State or local legal requirement" in section 253(a) be interpreted broadly. The fact that Congress included the term "other legal requirements" within the scope of section 253(a) ***recognizes that State and local barriers to entry could come from sources other than statutes and regulations***. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term "legal requirement" broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition.[193]

Thus, the plain language of Section 253(a) emphasizes that it does not apply only to "regulatory" actions by cities or exempt "proprietary" actions.

Even looking at the proprietary/regulatory distinction that has been drawn in Section 332 cases, the mere ownership of the property is not determinative. Applying the Supreme Court's precedent, the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, articulated the following test for evaluating whether "a class of government interactions with the

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[191] 47 U.S.C. § 253(a).

[192] 14 FCC Rcd 21697, 21705 ¶¶ 12-18 (1999).

[193] *Id.* at 21707 ¶ 18 (emphasis added) (internal footnotes omitted).

market [is] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out":

> (1) whether "the challenged action essentially reflects the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances," and (2) whether "the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."[194]

Applying that standard, local requirements governing small wireless facility access to the public rights-of-way are clearly regulatory in nature, not "proprietary." When cities impose requirements on telecommunications providers deploying small wireless facilities in the public rights-of-way, the demands do not reflect the city's own interest in its efficient procurement of needed goods and services. They are imposing a general policy. Indeed, the local governments' comments confirm that they are indeed imposing general policies.[195]

The analysis also extends to city-owned poles. For example, in *NextG Networks of NY, Inc. v. City of New York*,[196] the court rejected New York City's argument that its requirements for access to city-owned street light poles was exempt from Section 253. The court recognized that the city's scheme for allowing access to city-owned poles was not narrow and instead fundamentally reflected the city's management of access to the public rights-of-way. Accordingly, the court concluded that access to city-owned poles was subject to Section 253's limits.

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[194] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999); *see also Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002).

[195] *See, e.g.*, Montgomery County Maryland Comments at 28-33; Siting Coalition Comments at 48; Minneapolis Comments at 3-4.

[196] 2004 U.S. Dist. LEXIS 25063.

4. Local Governments' Interpretation of Section 253(c) is Unsupported

WIA's initial comments demonstrated that the appropriate interpretation of Section 253(c) is that local government "compensation" for use of the public rights-of-way must be limited to recovery of the local government's cost of managing the small wireless facility's occupation of the public rights-of-way.[197] Local government comments, not surprisingly, seek to rely on contrary cases. Several commenters go so far as to argue that the meaning of Section 253(c) is so clear as to warrant no Commission interpretation—asserting even that it is "a model of clarity"[198]—despite judicial opinions on the provision's ambiguity.[199] There can be no dispute that a conflict exists in the interpretations of Section 253(c), which is precisely why the Commission should provide a declaratory ruling confirming that the statute limits local governments to cost recovery for their role in managing small wireless facilities in the public rights-of-way.

Indeed, the local governments' comments confirm the concerns that drove the analysis of the First and Second Circuits. Those courts explained that the rationale for limiting local government fees to recovery of their actual cost is to prevent local governments seeking to profit from their monopoly control over the rights-of-way. For example, in *White Plains*, the Second Circuit explained that "Section 253(c) requires compensation to be reasonable essentially to

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[197] WIA Comments at 67-60.

[198] Texas Municipal League Comments at 24 ("a model of clarity); National League of Cities Comments at 16 (Section 253(c) is "not ambiguous"). Tellingly, both the Texas Municipal League and National League of Cities comments implicitly acknowledge the ambiguity of the statute by arguing that its legislative history sheds light on their version of its meaning. Texas Municipal League at 22; National League of Cities at 22-24.

[199] *See, e.g.*, *City of Santa Fe*, 380 F.3d at 1272 (noting the "confusing linguistic construction of § 253(c)"); *Town of W. N.Y.*, 299 F.3d at 240 ("Section 253 is quite inartfully drafted and has created a fair amount of confusion.").

prevent monopolistic pricing by towns."[200] The First Circuit reiterated that holding in *Puerto Rico Telephone.*[201]

Local government comments reveal that such pricing is a real concern. As noted above, Minneapolis, for example, uses its code to drive use of its poles for its own profit.[202] The City of San Antonio Coalition likewise argues that they should be allowed to set their prices like private landlords—charging whatever they can get away with.[203] The Georgia Municipal Association argues that municipalities should charge "fair market value," defined as "what it would cost the user . . . to purchase access from a private property owner."[204] Indeed, the San Antonio Coalition complains that requiring nondiscriminatory fees "is certainly not how property is priced in the private sector."[205] But that is the fundamental point—local governments are *not* in the private sector. They are managing a public asset that wireless providers seek to use to provide services that are in the public interest. Indeed, Congress' recognition that "telecommunications interests of constituents . . . are not only local" but "are statewide, national and international as well . . . was the genesis of its grant of preemption authority to this Commission" in Section 253.[206] Read, as it must be, to effectuate Congressional intent to open local markets to competitive telecommunications service providers, Section 253(c) does not allow the "maximum

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[200] 305 F.3d at 79.

[201] 450 F.3d at 22 (quoting *City of White Plains*, 305 F.3d at 79).

[202] Minneapolis Comments at 3-7.

[203] *See, e.g.*, Cities of San Antonio, *et al.* Comments at 26-27.

[204] Georgia Municipal Ass'n Comments at 5.

[205] Cities of San Antonio *et al.* Comments at 27.

[206] *TCI Cablevision*, 12 FCC Rcd at 21442 ¶ 106.

profit" model of compensation urged by municipal commenters to survive scrutiny. Municipal exploitation of their monopoly control over a public resource is incompatible with the statute.

Municipal commenters argue that legislative history stemming from comments in the House of Representatives from Representatives Barton and Stupak support their position.[207] However, comments made in the House cannot be relied upon because Congress ultimately adopted the Senate version of Section 253.[208] Thus, it is not reasonable to rely on comments made in the House to interpret the provision because those comments simply are not the history that corresponds to the adopted provision.[209] Rather, as WIA explained, the correct legislative history of Section 253 supports a limitation to costs. Senator Dianne Feinstein, during the floor debate on Section 253(c), offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including "require a company to pay *fees to recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation."[210] Thus, Congress intended to preserve the ability of cities to recover the costs directly created by managing the new occupation, not to allow cities to profit from new technologies and competition.

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[207] *See, e.g.*, NLC Comments at 22-24; Siting Coalition Comments at 60-61.

[208] Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. at H1111 (daily ed. Jan. 31, 1996). There appears to have been some confusion on this point, with some courts apparently blindly accepting municipal assertions that Stupak-Barton became law. The Conference report, however, clearly shows that the Senate, not the House, version of Section 253 was adopted. *See also Classic Tel., Inc.*, 11 FCC Rcd 13082, n.65 (1996) (subsequent history omitted) (recognizing adoption of Senate Bill).

[209] 2A Sutherland Statutory Construction § 48:14 (7th ed.) (discussing weight to be given to statements of committeemen and sponsors).

[210] 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added); *see also Classic Tel.*, 11 FCC Rcd 13082, 13103 ¶ 39 (1996).

In WIA's initial comments, it also demonstrated that local government fees for use of the public rights-of-way must be competitively neutral and nondiscriminatory under Section 253(c).[211] WIA and other comments chronicled how local governments impose fees on small wireless facilities in the public rights-of-way that are radically higher than the fees, if any, imposed on other telecommunications providers occupying the right-of-way.[212] Local government commenters' attempts to justify their discriminatory fee demands are unavailing.

For example, the San Antonio Coalition advances the often-rejected assertion that it is "unreasonable" to expect "that the rent for use of municipal ROW or light poles should never change but should instead be locked into a rate charged 5, 10, or 100 years ago."[213] Yet, as WIA demonstrated, the Commission and courts have rejected this municipal attempt to profit from new entrants.[214] Indeed, the Commission filed an *amicus* brief before the Second Circuit in *White Plains* in which it stated that "a local telephone franchise fee that applies only to new entrants and not to incumbent local exchange carriers is not competitively neutral and nondiscriminatory under section 253(c)."[215] There is ultimately no legitimate grounds for local governments to charge small wireless facilities fees for use of the rights-of-way that are discriminatory. That is

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[211] WIA Comments at 64-67; *see also* ExteNet Comments at 33-36; Crown Castle Comments at 27-30; Verizon Comments at 17; Lightower Comments at 18-20; T-Mobile Comments at 28-30.

[212] WIA Comments at 64; *see also* ExteNet Comments at 10; Crown Castle Comments at 11-14.

[213] San Antonio Comments at 26-27.

[214] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, Appendix H at 7621-22 ¶ 29 (1994) (rejecting costs imposed only on new entrants); *City of White Plains*, 305 F.3d at 79 (fee imposed only on new entrant but not incumbent violates Section 253); *RT Commc'ns*, 201 F.3d at 1269 (rejecting argument that regulation was "competitively neutral" because it treated all *new* entrants the same)

[215] FCC Br. in *City of White Plains*, 2001 WL 34355501, at *8.

not to say that a small wireless facility network occupying ten poles should pay the same as a local exchange carrier that occupies tens or hundreds of miles of public rights-of-way. The fees for both companies should reflect the costs that their particular use imposes on the local government. But there is no basis for those costs to radically differ on an incremental basis.

Finally, some of the local governments' arguments rely on strawmen. For example, WIA and other industry commenters are not requesting that the Commission oversee city costs or set a single national application fee.[216] WIA supports a declaration by the Commission that articulates that local governments are limited to recovery of their reasonable and legitimate costs caused by a small wireless facility deployment in the public rights-of-way. That does not mean that the local government can re-pave its streets or renovate its sewer lines at the expense of small wireless facilities. But reasonable and appropriate right-of-way management activities, such as application processing and inspection, would be recoverable.

E. The Commission Should Also Address Impediments Created by Pole Attachment Problems, Historic Preservation Regulations, and Environmental Assessment Regulations

WIA also supports the requests for the Commission to take steps on other issues that will facilitate deployment. For example, Verizon noted that it continues to encounter significant problems with investor owned utilities that impose unreasonable terms and conditions on access to poles that effectively prohibit access to wide swaths of poles.[217] Other WIA members have reported similar problems. WIA supports Verizon's recommendation that the Commission act to promote access to all investor-owned poles, including a six-month or shorter timeframe for Commission action on pole attachment complaints, and that the Commission use its leadership to

[216] *See, e.g.*, City of Austin Comments at 8; Town of Hempstead Comments at 2.

[217] Verizon Comments at 31-32.

promote action by states that regulate pole attachments. Indeed, frequently, conflicts between providers and local governments stem from restrictions imposed by utility pole owners. Providers are prevented from using existing poles by pole owner policies, which leaves local governments confused and frustrated by the alternatives that WIA's members are forced to propose in the alternative.

WIA also supports the concerns expressed by parties, such as Verizon and T-Mobile, that the Commission could help promote deployment of wireless infrastructure and services by addressing environmental and historic reviews for small wireless facilities under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). Notably, the Commission should reverse its 2014 decision to determine that small wireless facilities are neither a "major federal action" under NEPA nor a "federal undertaking" under the NHPA. As a result, such deployments would not be subject to environmental and historic preservation review.[218] The Commission also should establish shot clocks to process environmental assessments (EAs) and to resolve environmental delays and disputes.[219] And the Commission should eliminate the obligation to file an EA for sites located in a floodplain.[220] WIA also supports proposals to exclude collocations on "twilight towers" from historic preservation review.[221]

F. The Commission Should Continue Efforts to Streamline Tribal Reviews

WIA also encourages the Commission to continue its efforts to promote streamlining of tribal review of small wireless facilities on non-tribal lands. For the current tribal review

[218] T-Mobile Comments at 37-38.

[219] *Id.* at 39.

[220] Verizon Comments at 38-39; T-Mobile Comments at 39-40.

[221] Verizon Comments at 37-38.

system—the Tower Construction Notification System (TCNS)—to continue as a functional tool for tribal consultation, it must facilitate both tribal input on culturally significant properties and the rapid and efficient build-out of our nation's wireless infrastructure. As demonstrated by Verizon in its initial comments, historic preservation reviews, particularly reviews by tribes, are a significant source of delays and added costs for small cell deployment, even on projects where risks to tribal interests are exceedingly small.[222] Under the process, there is no limitation on the geographic areas where tribes may express an interest in reviewing projects, on the types of facilities tribes can review, on the time tribes can take to conduct reviews, or when fees can be assessed by tribes or the amount of those fees. WIA urges the Commission to formally clarify these issues through written guidance, and supports the proposals set forth by Verizon and CTIA to place reasonable limits on tribal historic preservation reviews of small wireless facilities.[223]

[222] *Id.* at 34-37.

[223] CTIA Comments at 47-49.

IV. CONCLUSION

As set forth in WIA's initial comments and as supported by the record of comments in this proceeding, the deployment of wireless networks and services is a crucial element of America's present and future economy. But the vision of the 1996 Act is far too often being thwarted by inconsistent, burdensome, and expensive parochial local regulations that seek to control and profit from the deployment of small wireless facilities. Accordingly, the Commission should take this opportunity to issue a declaratory ruling that will reinvigorate the meaning and purpose of Section 253 and, in so doing, further fulfill the Commission's mandate to promote the rapid deployment of broadband.

Respectfully submitted,

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